

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for the) Docket No.
Imperial Valley Solar Project) 08-AFC-5
(formerly known as SES Solar Two Project))
Imperial Valley Solar, LLC)
-----)

CALIFORNIA ENERGY COMMISSION
SECOND FLOOR CONFERENCE ROOM
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

MONDAY, AUGUST 16, 2010

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Transcribed by:
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1 have come up and we need to understand what the
2 implications of all those are as they regard the case.

3 And I also want to make sure, Mr. Renaud, that we
4 have a chance to hear if there's any friends from the
5 federal agencies on the line, but for right now I think
6 I'll ask Commissioner Eggert if he had any introductory
7 marks.

8 COMMISSIONER EGGERT: Thank you,
9 Commissioner Byron. Can you hear me?

10 COMMISSIONER BYRON: Yes.

11 COMMISSIONER EGGERT: Okay. I'll be brief
12 because I know we do have a lot to get through today.

13 I also want to welcome everybody and thank you
14 all for participating, those in Sacramento as well as down
15 south.

16 And similarly, I'm looking forward to hearing the
17 evidence on cultural. I understand there was a workshop
18 recently, and if there's relevant items from that, I'm
19 looking forward to hearing those. And I think if we move
20 forward expeditiously and efficiently, we can -- we'll be
21 able to get through most of it, hopefully, today.

22 And with that, I'll turn it back over.

23 COMMISSIONER BYRON: Thank you.

24 Thanks, Commissioner.

25 So I'm going to turn it over to our able hearing

1 officer who will take us through today's proceedings.

2 Mr. Renaud.

3 HEARING OFFICER RENAUD: Thank you,
4 Commissioner Byron.

5 Well, good morning, everyone. And I think first
6 thing we'll do is take introductions from those who are
7 here in the room.

8 Let's start with the applicant, please.

9 MS. FOLEY GANNON: Ella Foley Gannon. Counsel to
10 applicant.

11 MR. THOMPSON: Allan Thompson, also counsel.

12 HEARING OFFICER RENAUD: Thank you.

13 MS. FOLEY GANNON: And with us is Marc Van Patten
14 from Tessera Solar, and Bob Therkelsen, consultant.

15 HEARING OFFICER RENAUD: Thank you.

16 And staff.

17 MS. HOLMES: Staff is well represented by lawyers
18 today. Caryn Holmes, staff counsel. I'm going to be
19 trying to deal with some of the housekeeping matters that
20 Commissioner Byron talked about. Jared Babula is here to
21 deal with cultural resources. Christine Hammond is here
22 to talk about biological resources. We have some
23 biological resources staff in the audience. And
24 Christopher Meyer, the project manager, will be here
25 shortly.

1 HEARING OFFICER RENAUD: Not quite an army of
2 lawyers, but maybe a phalanx, something like that. All
3 right.

4 And from CURE, intervenor.

5 MS. MILES: This is Loulena Miles on behalf of
6 CURE. And I am the only intervenor here for CURE -- the
7 only lawyer here for CURE.

8 HEARING OFFICER RENAUD: Good morning. Good
9 morning and welcome.

10 Now, let's turn to the phone, and that would
11 include those of you who are on the phone, but also on our
12 computer WebEx video service.

13 Do we have any intervenors first of all, any
14 parties?

15 MR. BUDLONG: Tom Budlong here.

16 HEARING OFFICER RENAUD: Welcome, Mr. Budlong.
17 California Native Plant Society, anybody?

18 No. All right.

19 Do we have any representatives of federal
20 government agencies on the line? Please speak up.

21 Anyone from BLM?

22 No. All right.

23 MS. SIMMONS: This is Kerri Simmons from BLM.

24 HEARING OFFICER RENAUD: I'm sorry. Who was that
25 again?

1 MS. SIMMONS: Kerri Simmons from BLM El Centro
2 field office.

3 HEARING OFFICER RENAUD: Kerri Simmons, good.
4 Anyone else from BLM?

5 Any state agencies on the line? Fish & Game?
6 Nobody? Okay.

7 Anybody from Imperial County or other local
8 government jurisdictions? Water district perhaps?

9 No one? Okay.

10 Well, it is the cultural stuff; we might not have
11 Fish & Game people.

12 And is there anyone else on the phone who cares
13 to identify themselves?

14 MR. TAYLOR: Steve Taylor with San Diego Gas &
15 Electric.

16 HEARING OFFICER RENAUD: Welcome. All right.

17 MS. NASH-CHRABASCZ: Bridget Nash-Chrabasca with
18 (phone connection breaking up.)

19 HEARING OFFICER RENAUD: Could you speak up? We
20 couldn't get that, please.

21 MS. NASH-CHRABASCZ: Bridget Nash-Chrabascz with
22 the Quechan tribe.

23 HEARING OFFICER RENAUD: All right. Thank you.
24 Would you please spell the last name for the court
25 reporter?

1 MS. NASH-CHRABASCZ: N-a-s-h, hyphen, C-h-r-a-b-,
2 as in boy, -a-s-, as in Sam, -c-, as in cat, -z, as in
3 zebra.

4 HEARING OFFICER RENAUD: I'm glad you spelled
5 that. Thank you. If you want to speak at any time during
6 the hearing, I'll have to remind you to speak very, very
7 loudly. Your phone connection is particularly distant
8 sounding.

9 MS. NASH-CHRABASCZ: Okay.

10 HEARING OFFICER RENAUD: Or you might want to try
11 phoning in again and see if you don't get a better line
12 this time.

13 MS. NASH-CHRABASCZ: Okay. Will do.

14 HEARING OFFICER RENAUD: All right. Anyone else
15 on the phone?

16 MS. NISSLEY: Claudia Nissley.

17 HEARING OFFICER RENAUD: Okay. Welcome.

18 MS. APPLE: Rebecca Apple from AE Com.

19 HEARING OFFICER RENAUD: Let's go back to Claudia
20 Nissley first.

21 It's N-i-s-s-l-e-y?

22 MS. NISSLEY: That is correct.

23 HEARING OFFICER RENAUD: Good.

24 Next was Claudia -- no, Rebecca Apple from
25 AE Com.

1 MS. APPLE: Correct.

2 HEARING OFFICER RENAUD: AE Com.

3 Anyone else?

4 MS. LEIBA: Angela Leiba and Rachel Nixon from
5 URS.

6 HEARING OFFICER RENAUD: Very good. Welcome.

7 Anyone else on the phone?

8 MS. JENNINGS: Yes, Jennifer Jennings here in
9 El Centro with about five people.

10 HEARING OFFICER RENAUD: All right. And did I
11 hear you wanted to introduce your participants there?

12 MS. JENNINGS: Wanted to introduce themselves.
13 Donna.

14 MS. TISDALE: Donna Tisdale representing myself,
15 Back Country Against Dumps and the Protect Our Communities
16 Foundation.

17 DR. CAGLE: Dr. Fred Cagle, representing
18 Sierra Club.

19 MS. HARMON: Edie Harmon from Ocotillo -- (phone
20 connection breaking up.)

21 HEARING OFFICER RENAUD: We can't understand you
22 at all there. Could you get closer to the mic and speak
23 up, please.

24 MS. HARMON: Edie Harmon from Ocotillo. And I
25 was a witness for Tom Budlong on the groundwater issue.

1 HEARING OFFICER RENAUD: Thank you.

2 MS. JENNINGS: We have one -- two more
3 individuals here.

4 HEARING OFFICER RENAUD: All right. They don't
5 particularly need to introduce themselves, it's entirely
6 voluntary.

7 MR. ARROWWEED: Can you hear me?

8 HEARING OFFICER RENAUD: Go ahead, yes.

9 MS. JENNINGS: Can you hear him?

10 HEARING OFFICER RENAUD: We haven't heard him
11 yet. Try it again.

12 MR. ARROWWEED: Okay. I'm talking now.

13 HEARING OFFICER RENAUD: There you go.

14 MR. ARROWWEED: You heard me the first time.
15 Preston Arrowweed, Quechan tribal member.

16 HEARING OFFICER RENAUD: Good morning and
17 welcome.

18 MS. JENNINGS: And we also have a gentleman here,
19 Mr. Andresen from Swedish Public Radio.

20 HEARING OFFICER RENAUD: Welcome, good morning.

21 The gentleman before Mr. Andreson, I'm sorry,
22 sir, the court reporter needs to get the spelling of your
23 name. And so if you would please spell the last name,
24 we'd appreciate that.

25 MS. JENNINGS: I can spell it for him, because

1 I'm closer. A-r-r-o-w-e-e-d, Arrowweed.

2 HEARING OFFICER RENAUD: Very good. Thank you.

3 All right. The reason I'm asking for such
4 clarity on the names is that as I've -- as you've probably
5 gathered, this is a formal evidentiary hearing sponsored
6 by the California Energy Commission, and as such it is
7 being stenographically -- recorded and will be
8 transcribed. And for that reason everybody needs to speak
9 clearly and identify themselves when they speak so that
10 the record will be clear.

11 THE REPORTER: Could we get Donna to spell her
12 last name?

13 HEARING OFFICER RENAUD: T-i-s-d-a-l-e. We just
14 got a request for another spelling, but I happen to know
15 what one.

16 All right. Okay. I think enough said about that
17 aspect of it.

18 As Commissioner Byron said, this is yet another
19 evidentiary session; in fact, it's the, I believe, the
20 fifth day of evidentiary hearings for the Imperial Valley
21 Solar Power Project. The staff's cultural resources
22 testimony was filed on August 2nd, which was exactly when
23 they said it would be filed, but obviously we can't have a
24 hearing about it until after that. So here we are.

25 And we really have two big agenda items. And I'd

1 like to find out the order that you'd like to take them
2 in, if there's any consensus. One is obviously the
3 cultural resources testimony and cross-examination and so
4 on. And the other is a report from you all on your
5 progress, any progress you may have made in your
6 workshops, the court -- committee-sponsored workshops,
7 which we ordered at the last hearing.

8 Does anyone care to express a preference or
9 absolute requirement as to which we do first?

10 I'm gathering Ms. Miles would like to speak.

11 MS. MILES: Very much so. One of my experts,
12 Bridget Nash, she was actually in the hospital yesterday.
13 And just for the benefit of the parties, I've already told
14 the hearing officer this. But we're just concerned about
15 her because she cannot take -- they prescribed some strong
16 medication for pain, and so she would prefer to be able to
17 testify at least in the first half of the day just so that
18 she could then take the medication that she needs.

19 HEARING OFFICER RENAUD: All right. And I know
20 she's with us now.

21 MS. MILES: Yes.

22 HEARING OFFICER RENAUD: So quite a strong vote
23 in favor in proceeding with cultural resources. And
24 unless anybody objects, I propose that's what we do.

25 MS. HOLMES: I don't object, but I would like to

1 take five minutes of the committee's time to walk through
2 the revised conditions of certification and make sure that
3 everybody understands what is in the record. And I
4 believe the applicant has some additional information that
5 will come in to support some of the conditions that staff
6 has proposed. So I think the record would be clearer if
7 we took this opportunity now before you started on
8 cultural to do that. I don't think it will take more than
9 a few minutes.

10 HEARING OFFICER RENAUD: The conditions are other
11 than cultural?

12 MS. HOLMES: Yes. These are -- other than
13 cultural and other than biological resources.

14 HEARING OFFICER RENAUD: Okay. All right. It
15 doesn't sound like, you're saying, it will take long.

16 MS. HOLMES: I don't think so. I just want to
17 make sure that the record is clear and that there is an
18 agreement.

19 Staff proposed -- and what I'm going to do is
20 walk through the proposed changes that staff included in
21 Appendix A to its opening brief.

22 We noted that there was a minor clarification to
23 AQSE 3. It doesn't -- there's no additional evidence in
24 the record that's required for that. What we had
25 identified as AQSE 9 really should be AQSE 11. And the

1 evidence that that's based on is not yet in the record,
2 and I believe that the applicant is going to do that
3 shortly. Staff has no objection to it. It's the revised
4 modeling analysis.

5 MR. THOMPSON: That's correct.

6 MS. HOLMES: The changes to Hazardous Materials
7 Management Conditions 2 and 7 were based on evidence in
8 the record. There are also changes to Noise 4 and Noise 6
9 that were not discussed at the hearing, but the changes
10 are based on staff's past practices, the commission's past
11 practices as well. They reflect the kind of language that
12 we have used in prior decisions and conditions of
13 certification.

14 Soil and Water 1, obviously there's still dispute
15 between the parties as to the significance of impacts
16 having to do with residential use as well as to storage in
17 the aquifer. We have included a number of the changes
18 that the applicant recommended relating to clarification
19 as well as to make it -- I guess the clarification is that
20 the applicant has the ability to use either water source,
21 there's no limitation on the time period. And staff has
22 reflected that in its conditions of certification; no new
23 evidence in the record is required. Staff's analysis
24 addressed both possibilities.

25 That may be -- there's a new condition,

1 Reliability 1, that was discussed but not presented at the
2 hearings. That was included, I believe that the
3 evidentiary basis for that is in the record.

4 And then the visual resources conditions we
5 discussed at the hearing, and so there's no need to take
6 in new evidence on that.

7 Worker Safety 7 and 8 we discussed at the hearing
8 but the precise language wasn't provided. It's now been
9 provided in Attachment A to staff's brief.

10 And I believe that covers those changes. So it
11 seems to me that what does need to come in is the air
12 quality modeling analysis to support AQSE 11.

13 HEARING OFFICER RENAUD: And you don't think
14 testimony's needed for Reliability 1?

15 MS. HOLMES: I think that there's sufficient
16 evidence in the record to support Reliability 1. And as I
17 said, I think that the information that supports the
18 changes to the noise conditions would be found in past
19 commission decisions and conditions of certifications
20 related to noise. We lifted language from those
21 conditions to resolve a dispute between staff and the
22 applicant on noise conditions.

23 HEARING OFFICER RENAUD: Is Reliability 1 in your
24 brief?

25 MS. HOLMES: Yes.

1 HEARING OFFICER RENAUD: All right. Then that's
2 all I need to know. All right.

3 So do you want to do the AQ evidence right now or
4 later? Is it brief?

5 MS. HOLMES: Staff has no objections to
6 introduction of the modeling analysis.

7 You can identify it better than I can.

8 MS. FOLEY GANNON: What is being passed out is
9 the air quality analysis, which was completed to
10 demonstrate compliance with the new NOx standards that
11 have been adopted. This was docketed on August 10th. We
12 are going to ask that this be marked Exhibit 146.

13 HEARING OFFICER RENAUD: All right. 146 it is.
14 (Applicant's Exhibit 146 was marked for
15 identification.)

16 HEARING OFFICER RENAUD: And there's no objection
17 from staff, CURE, or Mr. Budlong?

18 Hearing none, that's admitted.

19 (Applicant's Exhibit 146 was received into
20 evidence.)

21 HEARING OFFICER RENAUD: Okay. Thank you.

22 MS. HOLMES: So that concludes our clarifications
23 about changes to the conditions of certification.

24 MS. FOLEY GANNON: I just have a couple of
25 questions just for clarity.

1 MS. HOLMES: Certainly.

2 MS. FOLEY GANNON: In going through your list
3 that you had attached to your brief, I got what you said
4 about Air Quality 3, AQSE 9 --

5 MS. HOLMES: It's actually AQSE 11.

6 MS. FOLEY GANNON: 11. Okay.

7 MS. HOLMES: We mislabeled it.

8 MS. FOLEY GANNON: Land 1 was also deleted; is
9 that correct?

10 MS. HOLMES: That's correct.

11 MS. FOLEY GANNON: Okay. Just to make sure.

12 GEN 2?

13 MS. HOLMES: I beg your pardon?

14 MS. FOLEY GANNON: GEN 2 I have listed here as
15 being in your exhibit.

16 MS. HOLMES: Land 2?

17 MS. FOLEY GANNON: No, GEN. I believe it's just
18 a timing correction.

19 MS. HOLMES: Most likely.

20 MS. FOLEY GANNON: It was the 30 days prior to
21 construction rather than 60 days.

22 MS. HOLMES: That's correct. And that was in
23 response to something that -- to a request that you had
24 made.

25 MS. FOLEY GANNON: Yes, right.

1 And we talked about HAZ 2 and HAZ 7. There was
2 also a change to HAZ 5?

3 MS. HOLMES: I believe that staff rejected the
4 change to HAZ 5. That has to do with the providing
5 background checks for people who come on site. There was
6 some discussion --

7 MS. FOLEY GANNON: All right. Yes.

8 MS. HOLMES: -- in a subsequent case, in the
9 Calico case, about trying to modify that, but we have not
10 seen a proposal yet. So at this point staff proposed the
11 proposed change to HAZ 5.

12 MS. FOLEY GANNON: Okay. And then Soils and
13 Water 11 was deleted?

14 MS. HOLMES: That is my -- yes, that's my
15 recollection, correct.

16 MS. FOLEY GANNON: And VIS 3. We talked about
17 the VIS; that's fine.

18 And then we will be providing some proposed
19 modifications to Worker Safety 8.

20 MS. HOLMES: Okay.

21 HEARING OFFICER RENAUD: Okay. And,
22 Ms. Foley Gannon, will any of that require evidence to be
23 put in the record?

24 MS. FOLEY GANNON: It is evidence that's already
25 in the record.

1 HEARING OFFICER RENAUD: Very good.

2 MS. FOLEY GANNON: But we will have a few other
3 exhibits that we would like to put into the record. We
4 can offer them now, or we can do it --

5 HEARING OFFICER RENAUD: Are they on cultural?

6 MS. FOLEY GANNON: -- after the cultural.

7 They are not cultural.

8 HEARING OFFICER RENAUD: Okay. Let's do that
9 after then.

10 MS. FOLEY GANNON: Okay. That's fine.

11 MS. HOLMES: Actually --

12 HEARING OFFICER RENAUD: We have some exhibit
13 housekeeping.

14 MS. HOLMES: -- could I ask what topics they are
15 on?

16 MS. FOLEY GANNON: We have the letter from the
17 fire department, which we docketed. We have the
18 information about the first year construction water
19 budget. We have the Phase 1 disturbance, Phase 1-A
20 disturbance area and narrative. And then we have some
21 revised conditions that we want to propose.

22 HEARING OFFICER RENAUD: Ms. Holmes?

23 MS. HOLMES: Staff doesn't have an objection to
24 introduction of the letter from the fire department, the
25 information about first year water use, or the Phase 1

1 information. I haven't seen the proposed changes to the
2 conditions of certification, so I guess we'll take a look
3 at them when they're presented.

4 HEARING OFFICER RENAUD: Yeah, let's do it then.

5 MS. HOLMES: I will be -- okay.

6 HEARING OFFICER RENAUD: We'll deal with those
7 things after -- I think we'll save that for the second
8 part of the day, which is the discussion of progress, and
9 it will fit right in.

10 MS. FOLEY GANNON: All right. That makes sense.

11 HEARING OFFICER RENAUD: All right? Good.

12 Okay. Any other preliminary matters before we
13 turn to cultural? All right.

14 Applicant, you may proceed.

15 MS. FOLEY GANNON: We will call Rebecca Apple,
16 who is on the telephone.

17 Rebecca, are you present?

18 MS. APPLE: Yes, I am.

19 MS. FOLEY GANNON: She should be sworn?

20 HEARING OFFICER RENAUD: Yes. Whereupon,
21 (Rebecca Apple was sworn.)

22 DIRECT EXAMINATION

23 MS. FOLEY GANNON: Thank you, Ms. Apple. Are you
24 the same Rebecca Apple who presented testimony earlier in
25 these proceedings which have been marked as Exhibit 111

1 and part of Exhibit 115 as well as giving oral testimonies
2 on May 25th?

3 MS. APPLE: Yes, I am.

4 MS. FOLEY GANNON: And is a resume that was
5 attached to that earlier written testimony still accurate
6 and correct?

7 MS. APPLE: Yes.

8 MS. FOLEY GANNON: Do you have any additions or
9 revisions to make to your earlier testimony?

10 MS. APPLE: No.

11 MS. FOLEY GANNON: Thank you.

12 In earlier testimony in May you described the
13 efforts that had been undertaken with regard to cultural
14 resource investigation and consultation with the various
15 agencies. Can you update the committee on events that
16 have occurred subsequent to our last conversation in May?

17 MS. APPLE: Yes, I'd be happy to.

18 Native American consultation is ongoing and has
19 included a three-day set of field visits to a number of
20 the sites with a number of tribal representatives. BLM
21 was also present.

22 There is another trip to the field to visit sites
23 with some more tribal representatives that is scheduled
24 for later this week.

25 In addition, a draft mitigation and monitoring

1 plan has been submitted to the Bureau of Land Management
2 as well as a Native American Grave and Repatriation Act
3 plan of action. For those not familiar with those, it's
4 similar to the monitoring and Native American issues, the
5 CRMMP, or the Cultural Resources Monitoring Mitigation
6 Plan that the CEC typically requires for a project.

7 Eligibility determination and project effects
8 information has also been provided to the Bureau of Land
9 Management. This identifies which sites are being
10 recommended eligible for the National Register and the
11 California Register and what project effects there might
12 be; in other words, whether the site is potentially
13 affected by an access road or a transmission line or
14 actual SunCatchers.

15 MS. FOLEY GANNON: And can you summarize the
16 eligibility determinations that you have -- the
17 recommendations that have been made to the BLM? How many
18 sites were recommended as being eligible?

19 MS. APPLE: I believe there are 108.

20 MS. FOLEY GANNON: 108 sites recommended as
21 eligible?

22 MS. APPLE: Actually a hundred -- well, actually,
23 I believe it's 174. There were some that were originally
24 made -- recommended, and then there are additional ones
25 based on analysis have been added as well.

1 Now, just because a site is eligible, one of the
2 things that Tessera has done is look at avoiding these.
3 So just because a site is eligible does not mean it would
4 be impacted by the project.

5 MS. FOLEY GANNON: That was going to be my next
6 question.

7 How many of the eligible sites are currently --
8 would be impacted by the project as it's designed
9 currently?

10 MS. APPLE: I believe that is actually is the --
11 I believe that number is 108. And those include though
12 many of these very ephemeral lithic scatters, which will
13 probably be addressed through the CARIDAP program, which
14 is a state program, to address low-density lithic scatters
15 So the number sounds high, but a good portion of these
16 sites are lithic scatters that will be treated
17 programmatically.

18 The project has made an effort to avoid many
19 sites. As previously stated, many acres on the eastern
20 end of the project were deleted from the project based on
21 cultural resource concerns. And currently the project as
22 designed is avoiding 65 archaeological sites that had
23 there not been project redesign, they would have been
24 impacted.

25 MS. FOLEY GANNON: And you referenced the fact

1 that a mitigation plan has been drafted and submitted.
2 Can you just briefly describe what that plans provides?

3 MS. APPLE: Well, that was an eligibility
4 determination and effects document. Until it is
5 determined what the eligibility is, specific mitigation
6 measures cannot be defined.

7 The mitigation requirements are based on the
8 eligibility determination, the eligibility determinations
9 have been -- recommendations have been made to BLM, and
10 the mitigation will follow once those determinations have
11 been made.

12 MS. FOLEY GANNON: And have you been involved in
13 the efforts to draft a programmatic agreement to address
14 potential impacts to cultural resources?

15 MS. APPLE: Yes. I was on the original committee
16 working group that helped draft the original language and
17 then have participated in reviewing and commenting.

18 In addition, I do have some other measures of
19 updates.

20 MS. FOLEY GANNON: Oh, please, go ahead.

21 MS. APPLE: One of the areas of concern has been
22 the Anza Trail corridor that is within the project site.
23 And Tessera has taken on additional analysis both of
24 radar-based data, aerial photographs, as well as
25 putting -- having a historian review available and even

1 some rather obscure information to try to better define
2 what would have been the route and to see if there are any
3 physical remains that would be evidence of some of these
4 more sophisticated measures in addition to the pedestrian
5 survey, which has been conducted.

6 With regard to the programmatic agreement, which
7 I indicated I've been a participant in helping draft, that
8 has been distributed in draft form with the final EIS and
9 it is anticipated that it will be signed in September.

10 MS. FOLEY GANNON: It's anticipated, when you say
11 signed in September, that's by --

12 MS. APPLE: That would be by the agencies
13 involved. This would include the Bureau of Land
14 Management, Office of Historic Preservation, SHPO. The
15 advisory council is also involved in this programmatic
16 agreement, as is the CEC.

17 There are also a number of other consulting
18 parties which have been invited to sign the agreement,
19 including Native American tribes and some individuals who
20 are participating in this call today as well. The Army
21 Corps of Engineers is also involved in the PA.

22 MS. FOLEY GANNON: When you described the basic
23 parameters in May, is there anything that has changed in
24 that draft that you would like to inform the committee
25 about?

1 MS. APPLE: There has been some minor refinement;
2 but in general, the program is still one that addresses
3 the existing known resources as well as the potential for
4 discoveries during construction.

5 MS. FOLEY GANNON: Thank you.

6 And have you had an opportunity to review the
7 supplemental staff assessment for cultural resources which
8 was released August 2nd?

9 MS. APPLE: Yes, I have.

10 MS. FOLEY GANNON: And do you have any comments
11 on the staff's analysis?

12 MS. APPLE: I believe the staff has done an
13 adequate analysis, and that they have made their finding
14 based on adequate information. They have a difficult job
15 in that this is a project where land ownership, land
16 management lies with a federal agency, and there have been
17 time constraints. But they have participated in the
18 programmatic agreement process and have been kept informed
19 of progress in the analysis and have acknowledged this
20 through their condition of certification.

21 MS. FOLEY GANNON: You overall express agreement
22 with the staff's analysis.

23 MS. APPLE: Yes, I do.

24 MS. FOLEY GANNON: And one further question.

25 Are you familiar with the Blythe project, which

1 is also located on BLM lands?

2 MS. APPLE: Yes, I am.

3 MS. FOLEY GANNON: And are you familiar with the
4 conditions of certification in that -- proposed in that
5 case?

6 MS. APPLE: Yes, I am.

7 MS. FOLEY GANNON: Do you believe in your opinion
8 that those conditions are necessary or applicable in this
9 case?

10 MS. APPLE: No, I do not.

11 BLM and CEC have been working very closely on the
12 Imperial Valley Solar Project and indicated in the
13 CEC's 1 through 11 in the FEIS --

14 MS. FOLEY GANNON: The FEIS for this -- for the
15 Imperial Valley Solar Project? Is that what you're
16 referring to?

17 MS. APPLE: For the Imperial Valley Project, yes,
18 where specific concerns have been laid out and discussed
19 in detail.

20 In the Blythe project, there has not -- while
21 there has been close coordination, CEC has chosen a
22 different approach to their project even in that their
23 conditions still acknowledge the Bureau of Land Management
24 needs to grant permission for these types of measures to
25 be implemented.

1 MS. FOLEY GANNON: Thank you.

2 For one further clarification, when you were
3 discussing the eligible sites, the number that you gave,
4 is that also including those sites that needed further
5 investigation, or were those the sites that have actually
6 been determined to be eligible?

7 MS. APPLE: At this point, BLM has not made
8 eligibility determinations.

9 MS. FOLEY GANNON: But your recommendations?

10 MS. APPLE: They are recommendations. I believe
11 there were originally 45 sites that were recommended
12 eligible, and then there's been an additional 108.

13 MS. FOLEY GANNON: Thank you.

14 No further questions.

15 HEARING OFFICER RENAUD: Cross-examination by
16 staff?

17 MR. BABULA: No cross.

18 HEARING OFFICER RENAUD: All right. CURE?

19 MS. MILES: No cross-examination.

20 HEARING OFFICER RENAUD: All right.

21 Does the committee have any questions?

22 Commissioner Byron, Commissioner Eggert?

23 No? Well, I do. Thank you.

24 All right. Some of this is just asking for
25 clarification.

1 Okay. First of all, you were asked about the
2 conditions of certification for the Blythe project. First
3 let's clarify, it's the Blythe Solar Project, the PMPD
4 that was just released, right?

5 MS. APPLE: Yes, that is true.

6 And for clarity, I am also lead cultural resource
7 manager for that project as well.

8 HEARING OFFICER RENAUD: Oh, good to know. Thank
9 you. All right.

10 And I believe I heard you say that you don't
11 think those are either necessary or applicable in the
12 Imperial case, but I didn't really catch why. So maybe
13 you could repeat that for me.

14 MS. APPLE: Okay. In the Imperial case, we have
15 close cooperation with CEC and BLM, we have an almost
16 finalized programmatic agreement, and we have some very
17 explicit conditions regarding cultural resource compliance
18 that have been issued as part of the final DEIS for that
19 project.

20 HEARING OFFICER RENAUD: Okay.

21 MS. APPLE: Already we have in place many, many
22 of the things that such conditions of certification would
23 be seeking to put forth.

24 HEARING OFFICER RENAUD: Thank you.

25 So I take it then you are familiar with the

1 conditions in the FEIS?

2 MS. APPLE: Yes.

3 HEARING OFFICER RENAUD: And within that chapter,
4 the chapter is cultural and paleo resources, they have
5 CUP 1 through 11, and they also include PAL 1 through 7.

6 Are you familiar with all of those?

7 MS. APPLE: Actually, my expertise does not
8 extend to paleontological resources.

9 HEARING OFFICER RENAUD: All right. Have you
10 reviewed those, the PAL 1 through PAL 7?

11 MS. APPLE: No.

12 HEARING OFFICER RENAUD: Okay. As far as the CUP
13 ones, 1 through 11, would -- is it your opinion that those
14 would be appropriate to apply those to the Imperial Valley
15 Solar Project?

16 MS. APPLE: Yes.

17 HEARING OFFICER RENAUD: All right. Would that
18 be in addition to -- it may already be in here, but in
19 addition to the programmatic agreement?

20 MS. APPLE: Yes.

21 HEARING OFFICER RENAUD: And would the
22 programmatic agreement supercede these CUP 1 through
23 CUP 11 when it's finalized, or would it be in addition to?

24 MS. APPLE: Well, because the programmatic
25 agreement process is a consultous process, there would be

1 the potential, and I believe that is indicated in the
2 beginning of the discussion of the CUP, that final
3 decision will rely on the consulting process.

4 HEARING OFFICER RENAUD: Okay. All right. Thank
5 you.

6 Hold on one second.

7 All right. Did you review any of the
8 alternatives to the proposed project, and by that I mean
9 the 750-megawatt project?

10 MS. APPLE: Yes.

11 HEARING OFFICER RENAUD: Okay. Which ones; or
12 should I just say it's all of them?

13 MS. APPLE: Yes.

14 HEARING OFFICER RENAUD: All of them, all right.

15 So are you familiar with the preliminary LEDPA,
16 also known now as the agency-preferred alternative for the
17 BLM, also known as 709?

18 MS. APPLE: Yes.

19 HEARING OFFICER RENAUD: All right. Would the
20 impacts from 709 be any different than the proposed
21 project, and if so, in what way?

22 MS. APPLE: So you're asking if the -- if the
23 LEDPA or the agency preferred would have different impacts
24 than the applicants propose?

25 HEARING OFFICER RENAUD: That's right, bearing in

1 mind that it's on the same site, but is somewhat smaller.

2 MS. APPLE: It conceivably has fewer impacts, but
3 the applicant is already avoiding most of the site or many
4 of the sites that are within the solar fields, and
5 typically cultural resource sites do not occur in the
6 drainages. So while the LEDPA would have, in my
7 estimation, a lightly-reduced impact, we're not talking
8 major differences.

9 HEARING OFFICER RENAUD: Very good. Thank you.

10 MS. APPLE: But the measure's already in place.

11 HEARING OFFICER RENAUD: Thank you very much.

12 I think that's all the questions I have.

13 Any redirect?

14 Recross?

15 Committee?

16 Nope?

17 Okay. Thank you.

18 MS. APPLE: Thank you.

19 HEARING OFFICER RENAUD: Applicant, do you have
20 another cultural witness?

21 MS. FOLEY GANNON: That ends our cultural
22 testimony.

23 HEARING OFFICER RENAUD: Very good.

24 Staff, cultural?

25 MR. BABULA: Okay. Would you like to -- I'd just

1 like to get the staff assessment in the record first.

2 HEARING OFFICER RENAUD: Yes, that's -- we're
3 calling that Exhibit 307.

4 MR. BABULA: It's 307, correct. I'd like to move
5 that into the record.

6 HEARING OFFICER RENAUD: All right. Any
7 objection to that being admitted?

8 MS. FOLEY GANNON: No objection.

9 HEARING OFFICER RENAUD: CURE?

10 MS. MILES: No objection.

11 HEARING OFFICER RENAUD: Mr. Budlong?

12 All right. That will be admitted.

13 (Staff's Exhibit 307 was received into evidence.)

14 HEARING OFFICER RENAUD: All right.

15 MR. BABULA: Well, I have just one witness, it's
16 our cultural expert, Mike McGuirt.

17 MS. MILES: Point of clarification. I believe
18 Christopher Meyer is also a witness on the cultural. No?

19 Your resume is at the back of that supplement.

20 (Discussion beyond microphone range.)

21 MS. MILES: Right. I had a couple of questions
22 related to project description for Christopher Meyer
23 related to --

24 HEARING OFFICER RENAUD: Okay. Well, I think
25 staff hasn't put on their testimony yet; so am I correct

1 about that?

2 MR. BABULA: Right. Well, I wasn't going to do
3 project description in cultural, but we'll -- let's do
4 cultural first, and then if you're not -- if you want to
5 talk --

6 HEARING OFFICER RENAUD: It's staff's turn.
7 So go ahead.

8 Ms. Miles, we'll get to you.

9 MR. BABULA: Okay. The witness will probably
10 need to be sworn in, I think.

11 (Mr. Mike McGuirt was sworn.)

12 DIRECT EXAMINATION

13 MR. BABULA: Okay. The only real direct I have
14 then is for our witness to just address the committee's
15 question, which the applicant did a little bit. So I will
16 just let Mike respond to the e-mail that we received from
17 the committee regarding, again, why is there only one
18 condition of certification in CUL 1 in this project.

19 MR. MCGUIRT: This e-mail also mentioned Abengoa.
20 Is the committee interested in hearing anything about
21 Abengoa and why we didn't go a similar route to Abengoa?

22 HEARING OFFICER RENAUD: Yes, we're interested in
23 all the information we can get about the use of a set of
24 cultural conditions versus the one that's been recommended
25 here.

1 MR. McGUIRT: Okay. In the case of Abengoa,
2 there wasn't a federal nexus, so it was a straight energy
3 commission project, and so we went our traditional route,
4 which is to include all those conditions of certification.

5 I'm not seeing it on here. What's the other one?
6 Blythe. Okay.

7 In the case of the I-10 corridor projects, which
8 are Blythe, Genesis, and Palen, when it came time to
9 publish the staff assessments, the programmatic agreements
10 that were in the very initial stages of being developed --
11 being developed, weren't far enough along to really be
12 able to refer to them in our analysis.

13 And so in that case it was decided that staff
14 would go ahead and devise and publish a set of conditions
15 in the absence of asking anything to refer to in terms of
16 a developed document.

17 As Ms. Apple pointed out, in the case of
18 Imperial, this was our first big really joint project out
19 of the gate, and we've been in close coordination with the
20 BLM for basically two years. And at the time that we were
21 publishing the staff assessment for that document, the
22 formal consultation to develop the agreement document was
23 already underway, and it was known to staff what the
24 general form of that was going to be. And so we felt in
25 that case that it was appropriate to go ahead and have the

1 one condition of certification which referred to the PA.

2 As we move forward with cultural in this joint
3 process with the BLM, the idea all along was to try to
4 streamline and expedite the cultural resources compliance
5 both under the state and federal regulations. So after a
6 lot of in-house discussions here at the energy commission,
7 and the BLM discussing it in house, and then together we
8 decided that essentially trying to move forward with a
9 process that jointly dealt with NEPA, CEQA, and
10 Section 106 all at once was going to get us to a place at
11 the end where we had under both the federal right-of-way
12 grant that they're getting from the BLM and our license,
13 that the applicant and ultimately, should it be approved,
14 the project owner would have one set of cultural resources
15 conditions to deal with instead of having a separate one
16 that the BLM had devised and a separate one that the
17 energy commission had devised, which would put them in a
18 difficult position, because you'd have potentially
19 conflicting mitigation measures and conflicting ways to
20 proceed. And we were hoping to avoid that situation.

21 And so for us at Imperial Valley, we felt that
22 the publication of the original staff assessment, that it
23 was far enough along to begin to refer to it, and
24 subsequently, before we went out with a revised staff
25 assessment, the document was well along its way.

1 MR. BABULA: Are there any other issues, points
2 you'd like to bring up, Mike, either in response to what
3 applicant's testimony was today or any other information?

4 MR. McGUIRT: I don't have anything else.

5 MR. BABULA: Okay. Then that's all I have for
6 direct.

7 If anyone has any cross or if the committee has
8 additional questions, we can take those.

9 HEARING OFFICER RENAUD: Cross by applicant?

10 MS. FOLEY GANNON: No questions.

11 HEARING OFFICER RENAUD: Cross by CURE?

12 MS. MILES: Well, I have a few questions that I
13 was going to ask Mr. Meyer, but it's -- perhaps
14 Mr. McGuirt can answer them. So I'll go ahead and pose
15 them. And if not, then I'll ask if I can cross Mr. Meyer
16 on those questions.

17 HEARING OFFICER RENAUD: Very good.

18 CROSS-EXAMINATION

19 MS. MILES: Mr. McGuirt, if the project is
20 approved, approximately how many SunCatcher units will the
21 applicant be permitted to construct on the project site?

22 MR. McGUIRT: That's beyond my expertise.

23 MS. MILES: That's what I thought you might say.

24 Okay. Well, this may be within your expertise.

25 What is the diameter of these units, and how deep

1 will they be drilled into the ground?

2 MR. McGUIRT: That's -- that sort of technical
3 information is beyond my expertise.

4 MS. MILES: Will excavation or ground disturbance
5 occur at the site of each SunCatcher unit prior to
6 installing the units?

7 MR. McGUIRT: I understand -- again, I'm not a
8 technical expert in this area. I understand that it is
9 because the pedestals will need to be installed and there
10 will need to be wiring for each of these SunCatchers, you
11 know, into collection units; so I assume that there's
12 going to be ground disturbance there.

13 MS. MILES: I would actually like to -- prefer --
14 I would prefer to ask Mr. Meyer these questions if
15 possible.

16 Counsel, Mr. Babula, would you object to that?

17 HEARING OFFICER RENAUD: Does staff -- counsel,
18 does staff object to that? If so we can talk about it.
19 He is here.

20 MR. BABULA: I mean, it seems like it's just
21 basic information in the record already from prior -- I
22 don't particularly have an objection to it, if Mr. Meyer
23 knows the answer.

24 HEARING OFFICER RENAUD: All right.

25 Ms. Miles, I do have one question for you before

1 we make a decision -- or a ruling.

2 You stated you saw Mr. Meyer's -- you feel he's a
3 cultural witness on Exhibit 307, and I'm just curious as
4 to where you find that.

5 MS. MILES: In the executive summary on page
6 ES-1.

7 MR. BABULA: This isn't in the cultural section.

8 MS. MILES: Well, it's in the cultural staff
9 assessment.

10 HEARING OFFICER RENAUD: The new Exhibit 307?

11 MS. MILES: Yes.

12 HEARING OFFICER RENAUD: ES-1. Oh, I see. All
13 right.

14 Well, she's got a point. His name is on the
15 executive summary. Mr. McGuirt's name is on the overall
16 discussion. But I think given that --

17 MR. BABULA: I think -- it's probably a copy -- I
18 mean, it's probably the executive summary for the whole
19 document, so --

20 HEARING OFFICER RENAUD: Well, fine. I
21 understand.

22 MS. MILES: I mean, these questions, most of the
23 answers probably are just in the staff assessment,
24 however, it's not entirely clear to me. For example, I --

25 HEARING OFFICER RENAUD: I haven't heard a big

1 problem with this from staff, so let's just go ahead and
2 do it.

3 MS. MILES: Okay.

4 HEARING OFFICER RENAUD: He's here, be sworn.

5 (Mr. Christopher Meyer was sworn.)

6 CROSS-EXAMINATION

7 MR. MEYER: Just a point of clarification.

8 These are questions on the project description in
9 the staff assessment that was filed back in February?
10 Because there was not a project description as part of
11 this document that we were -- as part of the cultural
12 resource document.

13 MS. MILES: Well --

14 HEARING OFFICER RENAUD: There's a July staff
15 assessment as well, Exhibit 302.

16 MS. MILES: These are just -- there aren't a lot
17 of questions, and I think that you'll be able to answer
18 them.

19 MR. MEYER: I just want to make sure that -- I'm
20 sorry, you're talking about the supplemental staff
21 assessment with the all the sections except for the
22 cultural resource.

23 MS. MILES: No. Actually, I'm talking about the
24 supplemental staff assessment part II published on
25 August 2nd.

1 MR. MEYER: Okay.

2 MS. MILES: Your resume was attached to that, and
3 you were listed as a witness.

4 MR. MEYER: Oh yes, I thought you were asking
5 project description questions, which --

6 HEARING OFFICER RENAUD: I'm not sure there's
7 been a question yet, Mr. Meyer. So why don't we wait for
8 the question before we discuss it, okay?

9 MR. MEYER: Okay.

10 HEARING OFFICER RENAUD: Thank you.

11 MS. MILES: Mr. Meyer, if the project is
12 approved, approximately how many SunCatcher units will the
13 applicant be permitted to construct on the project site?

14 MR. MEYER: I can't speak to what the ultimate
15 project that's approved by the energy commission is, but
16 staff's recommendation was on the reduced --

17 MS. MILES: Drainage avoidance --

18 MR. MEYER: -- drainage avoidance alternative
19 number 1, which was based on an area. And it was only an
20 estimation of around 632 megawatts, or 23. And staff did
21 not put any limitations on the number of SunCatchers and
22 number of megawatts, just solely on the avoidance of
23 certain resources.

24 MS. MILES: Okay.

25 MR. MEYER: But this is just staff's

1 recommendation.

2 MS. MILES: Okay. What is the diameter of a
3 SunCatcher unit, and how deep will they be drilled into
4 the ground?

5 MR. MEYER: The diameter, we say approximately
6 40 feet. It's closer to 38 feet, depends on --

7 MS. MILES: I actually mean the part that would
8 go into the ground.

9 MR. MEYER: You're asking about the pedestal?

10 MS. MILES: The pedestal, yes. Thank you.

11 MR. MEYER: I'd have to -- I believe they're
12 about two feet. And the methodology for placing the
13 SunCatchers has changed over the course of the project.
14 Originally it had been discussed as a more traditional
15 auger situation where they would actually drill a hole,
16 pour a concrete foundation. For several reasons the
17 applicant determined that the preferred methodology for
18 installing them, based on experiments they had done, was
19 using a vibration piling, sort of a technique similar to,
20 you know, putting pilings in where they vibrate a tubular
21 steel structure in that originally had wings, which I
22 believe the stabilization wings that were on the tubular
23 steel have been removed.

24 MS. MILES: That was actually my next question.

25 Will there or won't there be fins on the units?

1 Because on page C.3-128 of this document it does state
2 there will be fins. And I was -- I thought that I had
3 heard that they had been removed from the project design.

4 MR. MEYER: Oh, in the cultural resource section.
5 That's something that I would -- I believe they will be
6 removed, but that would be something to confirm with the
7 applicant.

8 MS. MILES: And in terms of SunCatcher units that
9 might need to be, I believe, rebar enforced or -- did the
10 staff make an estimate as to how many units or what
11 percentage might need to be reinforced?

12 MR. MEYER: No, the application that staff has
13 does not have a detailed location for each of the 30,000,
14 give or take, SunCatchers. And without that specific
15 information of an exact location where each one would be,
16 there's no way staff could make any reasonable estimation
17 as to which ones may require vibration or which ones could
18 require other alternative excavation techniques.

19 And also, a lot of this will be determined on the
20 success of the vibration. If they vibrate down eight feet
21 and then hit something and are not able to proceed, that's
22 beyond staff's ability to analyze.

23 MS. MILES: Okay. Thank you.

24 That's all I have on project description.

25 HEARING OFFICER RENAUD: Do you have any other

1 cultural resources cross-examination?

2 MS. MILES: I do. I have some questions for
3 Mr. McGuirt.

4 HEARING OFFICER RENAUD: Go ahead, please.

5 CROSS-EXAMINATION

6 MS. MILES: So based on what we just heard, the
7 testimony from Mr. Meyer, would you say that it's fair to
8 assume when these units are installed it will not be
9 possible to determine whether subsurface archaeological
10 resources are present?

11 MR. MCGUIRT: In relation to if the pedestals are
12 shaken into the ground basically, vibrated into the
13 ground?

14 MS. MILES: Yes.

15 MR. MCGUIRT: Yeah, you won't be able to see.

16 MS. MILES: So I would -- as a follow up, just to
17 clarify, is it fair to assume that the installation of the
18 units could impact subsurface archaeological or destroy
19 subsurface archaeological resources?

20 MR. MCGUIRT: Disturb.

21 MS. MILES: Disturb. Perhaps not destroy.

22 Will the energy commission -- is it staff's
23 recommendation that the commission require test
24 excavations at the site of each SunCatcher unit prior to
25 the installation of the unit?

1 MR. McGUIRT: No.

2 MS. MILES: Was this impact analyzed or mitigated
3 by staff?

4 MR. McGUIRT: I don't think you will find it in
5 the staff assessment as one that we considered.

6 Based on what we understand standard practice to
7 be, if these pedestals are, in fact, going to be vibrated
8 into the ground, to dig in advance of the vibration would
9 probably do more destruction to any resources that are
10 there than simply allowing the pedestals to be vibrated
11 into the place. And so based on that, we just left it.

12 MS. MILES: Has staff considered any other
13 techniques using -- I can't remember the name of the word,
14 but a technique where you can detect whether there's
15 subsurface resources without actually doing test
16 excavation?

17 MR. McGUIRT: I think you're referring to
18 geophysical methods. We also gave some consideration to
19 various parts of the project area, whether or not that
20 would be a reasonable way to proceed. We didn't think so.
21 For most geophysical methods, you ideally would like to
22 have a depositional environment in which you have
23 basically very fine-grain sediments, silt, sands, and
24 clays, not a whole lot of rocks, so that if you have any
25 cultural resources that are buried, any archaeological

1 deposits that are buried, and when you use the geophysical
2 techniques, it's much more likely to pick it up, and
3 you're much less likely to get false positives in a
4 geophysical study.

5 And we have solar projects where we are using
6 those methods. Beacon is one that comes to mind right
7 away that we felt like that was appropriate on.

8 In the case of Imperial, you have a large portion
9 of the project that's on an alluvial, a coalescing
10 alluvial -- a series of coalescing alluvial fans that have
11 a whole lot of large rocks, cobbles, boulders, et cetera,
12 that would most likely make those geophysical methods not
13 very productive.

14 MS. MILES: Thank you.

15 I have some questions about the resources
16 discussed in the supplemental staff assessment described
17 as "ethnographic resources."

18 In the supplemental staff assessment,
19 Mr. McGuirt, you say that the project area of analysis is
20 a composite, though not necessarily contiguous, geographic
21 area that accommodates different resource types such as
22 archaeological ethnographic and built.

23 How did you determine what are the ethnographic
24 resources in the project area of analysis?

25 MR. MCGUIRT: We did that with a combination of

1 background research, looking at ethnographic work that had
2 been done in the past. We did that also as a -- with --
3 through Native American consultation and trying to solicit
4 the views of the Native American community that had ties
5 to the area to ask and seek their help in identifying the
6 resources that were important to them culturally or had
7 religious significance to them or were sacred in some way.

8 And so through a combination of those methods, we
9 tried to pull together a universe of what may be
10 ethnographic resources.

11 MS. MILES: And can you describe briefly what are
12 the ethnographic resources in the project area of
13 analysis?

14 MR. McGUIRT: Most directly on the site, one of
15 the issues that we want to make sure and deal with and to
16 the best extent that we can take the Native American views
17 into account are the cremations that are present adjacent
18 to what is now the project area. And as I recall, at last
19 count there was only one cremation that was known that's
20 actually in the project area. And we had some of our
21 Native American consulting parties relate to us that the
22 cremations themselves, as well as the land on which those
23 cremations are found, are sacred to them.

24 This is a practice that they -- the cremation on
25 the ground like this is a practice that they still use,

1 and they let us know that the interest to them is not
2 simply the cremation itself as some sort of archaeological
3 focus of study, but it's the remains of the person that's
4 there as well as the land around it. And that today when
5 there's a cremation like this that's practiced, that that
6 land around that cremation is considered sacred for some
7 time. And they would like for the ashes and the remains
8 to be able to be blown naturally across the desert, and
9 the land that the ashes and remains come in contact with
10 is sacred.

11 And so we tried to look at different ways of how
12 we might accommodate that belief in terms of how do we
13 delimit what that resource is? It was fairly evident that
14 we shouldn't just delimit it as the cremation itself, that
15 we ought to look at, you know, some of the land around it.
16 And those consultations are ongoing, because it's a
17 very -- it's not a hard science empirical thing, it's
18 somewhat subjective about, you know, how much land is
19 sufficient, how much land is covered and sacred.

20 And so one of the aspects of the programmatic
21 agreement that we have in mind for Native American
22 consultation is to have those discussions continue and try
23 to come up with an idea of how we might group those
24 resources.

25 The cremations seem to cluster towards the

1 eastern portion of the project area, they're not
2 shotgunned across the whole project area. So it might be
3 possible, hypothetically, to come up with an aggregate
4 space that includes the cremations and some of the land
5 and have that set aside in some way to try to avoid a
6 visual impact to those areas. Whether or not it's going
7 to be sufficient ultimately in the eyes of the Native
8 Americans, we can't say.

9 You know, as a Euro-American myself, it's not my
10 place to tell the Native Americans, well, this is enough
11 land so that, you know, we have a visual buffer that's
12 appropriate. And so that's why in the supplemental staff
13 assessment we said that there may be ethnographic issues
14 that are unmitigable. We don't know at this point because
15 we're still in consultation on it. And we're going to do
16 the best that we can and try to resolve these issues in
17 the most reasonable way that we can, but the definitive
18 answer for that we don't have yet.

19 So those are resources that are on the site.

20 The Coyote Mountains have always been identified
21 as a Native American -- a sacred area, a place that
22 falls -- fits into their mythological system as well as, I
23 believe, Signal Mountain to the south. And then there is
24 a number of geoglyphs or intaglios that primarily fall to
25 the south of the project area. And the visual impact that

1 the project may have on some of those areas has been taken
2 into account. And we've discussed that and continue to
3 discuss what the character of those impacts are, whether
4 or not, you know, from the Native American perspective,
5 they are significant.

6 MS. MILES: So that, I believe, does answer my
7 question has the commission determined the significance of
8 the ethnographic resources; and as you just said, if I
9 understood correctly, you feel that you cannot until
10 there's been additional consultation.

11 MR. MCGUIRT: I think that we've been able to
12 determine that the -- that the cremations can be parsed
13 out as a significant ethnographic resource, and the study
14 on the others is ongoing. And the -- I think that we can
15 say that the effects to the cremations and the cremation
16 areas in the project area is a significant impact. And
17 we're working on trying to fully conclude our consultation
18 on whether and how we're going to be able to reduce that
19 to a less than significant level.

20 MS. MILES: To what extent did the commission
21 staff or you undertake analysis of the project's impacts
22 to Mount Signal or Coyote Mountains?

23 MR. MCGUIRT: Very little.

24 MS. MILES: And when you say "very little," could
25 you elaborate?

1 MR. McGUIRT: Early on in the planning process
2 the energy commission and the BLM had asked the applicant
3 to step back and take a look at what may potentially be
4 ethnographic resources. And there was some back and forth
5 as we tried to approach a limit of what we consider to be
6 a reasonable effort to do that. At the same time, we were
7 also carrying on our consultation with Native Americans.

8 The degree to which the Coyote Mountains and
9 Mount -- Signal Mount were significant didn't come up
10 until later in the consultation process. Actually, it's
11 been like this spring.

12 And so we have been continuing to work to look at
13 those and to see, you know, to consult further on them, to
14 look at the significance of them. So it's not something
15 that we dealt with early on in the process, and it's
16 something that -- and that's the way Native American
17 consultation goes. There are times when information
18 that's critical doesn't come up till later, because
19 relationships have to be developed and people have to
20 talk, and so sometimes things get revealed at a late date
21 in the process. And this is one of those cases.

22 MS. MILES: So when we talk about -- when you
23 mention work with the tribes through consultation, do you
24 anticipate much of that happening after the project is
25 approved?

1 MR. MCGUIRT: Yes. The development of the PA
2 itself has involved a lot of input from the Native
3 American communities, and the PA in a number of different
4 places calls out for a continuing and ongoing consultation
5 with Native Americans well after the project is approved
6 and throughout the compliance process.

7 MS. MILES: In the staff assessment you state
8 that the mitigation options will be constrained or limited
9 since the project is already approved. That was on page
10 C.3-155. And I wanted you to explain what that means
11 exactly.

12 MR. MCGUIRT: Could you tell me more specifically
13 what you're referring to?

14 MS. MILES: Sure. I could even --

15 MR. MCGUIRT: The page number.

16 MS. MILES: It's here.

17 MS. FOLEY GANNON: Can you reference a page
18 number, please?

19 MS. MILES: Yes. It's C.3-155.

20 HEARING OFFICER RENAUD: This is a response to a
21 comment; I think that's what you're referring to?

22 MS. MILES: Yes.

23 HEARING OFFICER RENAUD: All right.

24 MR. MCGUIRT: Okay. And can you ask me the
25 question again, please?

1 MS. MILES: I wanted to know, when you mention
2 that the mitigation options may be constrained or limited
3 after the project is approved, to what extent will they be
4 constrained or limited, and if you could describe how they
5 will be constrained or limited.

6 MR. McGUIRT: Well, at this point in the planning
7 process, I'm not sure exactly how far along they are in
8 the design.

9 Is it 60 percent?

10 MS. FOLEY GANNON: 50.

11 MR. McGUIRT: 50-ish, okay.

12 The further they are, the further the applicant
13 is along in the design process, and it narrows down the
14 further in time you get, the less options there are to
15 introduce major changes into the design of the project.
16 And that's just a function of where we are.

17 And so you know, in theory -- and I'm not sure
18 that this happens terribly often under any
19 circumstances -- if you had all of your cultural resources
20 information in hand before you put pencil to paper to
21 design your project at all, in theory you could design an
22 avoidance plan where you physically avoided all these
23 resources. And the further we get along in the process,
24 that constrains your ability to do that. It doesn't
25 preclude it totally, but it does, you know, over time, it

1 increasingly constrains your ability to avail yourself of
2 that option.

3 MS. MILES: Thank you.

4 And so with these constraints in mind, how do you
5 envision the mitigation being negotiated after the project
6 is approved for ethnographic resources?

7 MR. McGUIRT: The PA provides for a lot of
8 consultation, and the Section 106 process is a very
9 inclusive process, there are a lot of voices that go with
10 it. And it's very difficult for any one voice, you know,
11 in this case, myself as a staff member, for the energy
12 commission, to tell you what the outcome of those
13 consultations are going to be.

14 What a group or group of Native Americans
15 considers to be a reasonable attempt to mitigate or reduce
16 these significant effects to resources that are important
17 to them, they may come up with options that I can't even
18 conceive of or my counterparts at the BLM or the other
19 federal agencies. And so we don't know.

20 Some of the stock and standard things would be to
21 delimit areas around the cremations, that would be the
22 cremations and some area of land around it as -- and these
23 are hypotheticals that would be thrown out -- as no-build
24 zones and set those aside, you know, basically in
25 perpetuity, as avoidance areas.

1 And because in this case a lot of these occur on
2 the far eastern end of the project, that's feasible. You
3 know, they're going to lose a few SunCatchers, but as we
4 understand it, there's some wiggle room. So they could
5 wiggle the SunCatchers that they're going to lose to some
6 other part of the project area that wouldn't have such an
7 effect. That's the most obvious one there. That's the
8 most obvious mitigation. There may be others that the
9 Native Americans will come up with.

10 MS. MILES: I just want to clarify. So you say
11 that the cremations are clustered, but has any subsurface
12 testing been done yet on this project site?

13 MR. McGUIRT: Not to my knowledge.

14 MS. MILES: So can you say with reasonable
15 confidence that you wouldn't find burials in other
16 locations on the project site?

17 MR. McGUIRT: Not definitively; that can't be
18 said at this point.

19 MS. MILES: As a follow up to my last question,
20 can you conceive of or is there anything in the PA that
21 would allow the tribes to ever, like, if they prefer
22 avoidance of a resource, would the applicant be required
23 to redesign the project? So is there anything that would
24 trigger the requirement that the applicant would actually
25 have to avoid a resource?

1 MR. McGUIRT: As a firm and set requirement of
2 the applicant, no, this would all be part of the
3 consultation process, and it would be something that we
4 would try to work out with the applicant being one of the
5 consulting parties in the process.

6 MS. MILES: Now, would you have to get consensus
7 from the tribal members prior to allowing the applicant to
8 destroy, for example, or build on cultural resources in
9 any event?

10 MR. McGUIRT: If it's a resource that's
11 discovered, it's going to fall -- the treatment of that's
12 going to fall under the monitoring and discovery plan.
13 It's also one of the tiered documents out of the
14 programmatic agreement. And there's going to be a process
15 in there of about, you know, construction in the area of
16 the resources discovered will be halted, know that the
17 distance is sufficient to make sure that you're not doing
18 damage to the resource being found, and certain things
19 have to occur before construction can begin again in that
20 area.

21 Ultimately, under the Section 106 process, the
22 BLM is the lead federal agency. And at the end of the day
23 after all the consultations have occurred and all the
24 discussions have happened and we've been back and forth,
25 ultimately the BLM charge is to make a decision on the

1 basis of that consultation. And so they will -- might
2 make the final call ultimately, but they will also have to
3 evidence that they've taken into account all the
4 discussions that will have occurred.

5 MS. MILES: Thank you.

6 In the supplemental staff assessment you say that
7 you've been wholly engaged in the subsequent development
8 of the programmatic agreement and the process that the
9 document entails. And that's on page C.3-12. And I
10 wanted you to answer whether you were at the programmatic
11 agreement development meeting on May 18th, 2010.

12 MR. McGUIRT: No.

13 MS. MILES: And were you at the follow-up
14 programmatic agreement development meeting on June 16th,
15 2010?

16 MR. McGUIRT: No.

17 MS. MILES: And were you at the PA development
18 meeting on May 4th, 2010?

19 MR. McGUIRT: That one, I can't remember.

20 MS. MILES: I do believe I saw your name on the
21 list for the PA kick-off meeting; is that correct?

22 MR. McGUIRT: Yes.

23 MS. MILES: So is it fair to say you were not at
24 any of the meetings after the PA kick-off meeting where
25 the tribes participated and voiced their concerns about

1 the development of the programmatic agreement?

2 MR. MCGUIRT: No, it's not fair to say. The
3 energy commission staff has been a part of the working
4 group that Rebecca spoke about earlier, and there were
5 meetings that occurred in February, March, and April in
6 El Centro amongst the working group, which was the BLM, we
7 had -- several of the consultants were there, the energy
8 commission staff was there, SHPO was there from time to
9 time. And so we attended two meetings in person during
10 that time and another meeting by telephone in which we
11 developed the initial draft PA that was then released to
12 the larger consultation group subsequently for review and
13 comment.

14 And in addition to that, there's a lot of
15 discussions that have occurred between the BLM, a lot of
16 discussions that have occurred between the BLM and the
17 energy commission about the direction of the development
18 of the PA and how to introduce that to the group in a way
19 that would allow the energy commission to satisfy its
20 requirements under CEQA as well as the BLM to satisfy its
21 requirements under NEPA and Section 106. So there have
22 been a lot of off-line conversations as well.

23 MS. MILES: Perhaps I wasn't clear in my
24 question, because what I was trying to get at was whether
25 you had really witnessed the tribal concerns that had been

1 voiced at these programmatic agreement development
2 meetings. And my understanding was that there was only
3 one tribal representative at the -- I'm not sure what you
4 called it -- the subcommittee meeting for the --

5 MR. MCGUIRT: Working group meetings, yes.

6 MS. MILES: -- the working group meeting; is that
7 correct?

8 MR. MCGUIRT: That's right.

9 MS. MILES: Okay. Did you review the notes from
10 the meetings that you did not attend that were sent out a
11 afterwards by Kerri Simmons?

12 MR. MCGUIRT: I reviewed the notes and I spoke to
13 with Kerri about them.

14 MS. MILES: And so can you articulate what the
15 tribal concerns were that were expressed at these meetings
16 with regard to the development of the programmatic
17 agreement or the sacred sites that might be affected by
18 the project?

19 MR. MCGUIRT: Well, in a nutshell, the sense that
20 I got was that there was several of the Native Americans
21 groups who felt that the ethnographic resources were not
22 being taken wholly into account, particularly those that
23 related to the broad-sweeping vistas of the desert and our
24 ability looking both towards and away from the Coyote
25 Mountains and the impact that the project would have on

1 that viewscape. And similar concerns with Signal Mount.

2 And also, there's the Schneider Dance Circle to
3 the south of the interstate. And there was a lot of
4 concern expressed about the degree to which you were going
5 to get glint and glare from the project on the Schneider
6 Dance Circle, which has been there for a very long time
7 and is very sacred to the Native Americans.

8 And so as part of the -- I think staff's been on
9 something on the order of four to six different field
10 excursions out to the project area, one of which we went
11 out to the Schneider Dance Circle and that area down in
12 the Yuha basin and looked at a lot of those sites. So
13 that was of concern.

14 And then the concern about the cremations and how
15 those were going to be treated and the land with which the
16 cremations were associated; there was a concern that that
17 wasn't going to be adequately dealt with.

18 And so we have tried to incorporate explicit
19 discussion of those resources in our analysis and in our
20 discussions with the BLM.

21 MS. MILES: In the supplemental staff assessment
22 you say that the impacts to the associated values of the
23 archeologicals and ethnographic resources in the project
24 area of analysis may be lessened by the programmatic
25 agreement but not necessarily substantially. This is page

1 C.3-159, if you want to turn to that. And that the
2 impacts to these values may be unmitigable.

3 Is this correct?

4 MR. McGUIRT: Yes, that's staff's opinion.

5 MS. MILES: And is there any possibility that
6 some of these impacts could be -- to the associated values
7 could be mitigated?

8 MR. McGUIRT: Yes, that's possible.

9 MS. MILES: Is it possible that the energy
10 commission could require that the applicant -- to agree --
11 I'm sorry -- require that the applicant implement
12 mitigation strategies that could be required to avoid
13 impacts to the associated values?

14 MR. McGUIRT: Because we have a joint process
15 with the BLM that's being administered out of that
16 programmatic agreement, the energy commission in and of
17 itself is not going to be in a position to require the
18 applicant or the project owner ultimately to do anything.
19 We will do it as part of a consultation process with the
20 BLM and with the other federal agencies and with input
21 from the public and the tribes.

22 MS. MILES: Thank you.

23 How will the public be given an opportunity to
24 comment on the process after project approval in terms of
25 mitigation strategies and significance determinations?

1 MR. McGUIRT: The public will have the
2 opportunity to have input under the Section 106 process.
3 There's nothing that precludes them doing that.

4 MS. MILES: So the BLM does not act as the
5 gatekeeper through the 106 process to determine who can be
6 and who cannot be a consulting party?

7 MR. McGUIRT: Technically, the BLM does act as a
8 gatekeeper; they don't do that in a vacuum. Anybody that
9 wants to consult simply has to fill out a half-page letter
10 that says I would like to consult and my interest in it is
11 this, that, and the other thing; and the BLM considers
12 that request.

13 The other federal agencies could have some input
14 into that decision. And ultimately, the State Historic
15 Preservation Officer and the Advisory Council on Historic
16 Preservation, would also have input.

17 If someone requests to be a consulting party, and
18 they're denied, there's nothing that precludes them from
19 going to the SHPO or to the ACHP and saying, hey, I asked
20 to be a consulting party, and they're not letting me in
21 the door. And I can assure you that SHPO and ACHP will
22 have a talk with the BLM about whether or not that's
23 appropriate.

24 So when you say "gatekeeper," it's not the
25 exclusive gatekeeper; there's a lot of input and leverage

1 that goes on there.

2 MS. MILES: But it's definitely not a process
3 whereby anyone in the public would be guaranteed an
4 opportunity to participate.

5 MR. McGUIRT: That's a fair statement.

6 MS. MILES: Thank you.

7 How did you determine that the archaeological
8 sites within the project's area of potential effect are
9 CEQA significant or eligible under the National Register?

10 MR. McGUIRT: What we did was is we by -- through
11 the 25 percent sample that our staff assessment and the
12 supplemental staff assessment was based on, we were able
13 to characterize the universe of archaeological site types
14 that were in the project area. And on that basis, to be
15 able to say that if the, absent flat-out avoidance, which
16 did not appear to be an option in all cases, that the
17 effect of the project as a whole would have a significant
18 effect on the environment because there would be eligible
19 properties that would be destroyed or disturbed at least
20 partially. And so that was the basis for our conclusion
21 on that.

22 MS. MILES: But at this time you have not made a
23 determination of eligibility in terms of individual
24 archaeological sites.

25 MR. McGUIRT: No.

1 MS. MILES: All of the information on the sites,
2 that was derived by visual examination of the ground
3 surface; is that correct?

4 MR. McGUIRT: That's correct.

5 MS. MILES: And is it always possible to
6 determine the size, nature, and significance of sites
7 based solely on visual examination of ground surface?

8 MR. McGUIRT: No.

9 MS. MILES: Is it true that surface evidence
10 alone can be deceptive with respect to site size and
11 significance?

12 MR. McGUIRT: Yes.

13 MS. MILES: Do archeologists commonly conduct
14 test excavations which include surface artifact mapping
15 and collection?

16 MR. McGUIRT: Yes.

17 MS. MILES: And does that help them to accurately
18 determine site size?

19 MR. McGUIRT: In many cases.

20 MS. MILES: Can you confidently determine whether
21 or not burials are present?

22 And I think you've already answered this
23 question, so I'm going to actually skip that.

24 What is required to determine with reasonable
25 certainty whether burials are present within the site?

1 MR. McGUIRT: It depends on the context, the
2 physical context of your archaeological site.

3 When an archeologist is looking at a site and is
4 trying to determine in terms of its information value what
5 the data sets are that the site has, the archeologist
6 first needs to look at the land form in which the deposit
7 is on. And if you have a land form that would preclude by
8 the nature of the land form there being a buried
9 component, then you could assess the significance of it
10 based on what you're seeing at the surface or with some
11 very shallow excavations.

12 A case like that would be if you had an alluvial
13 fan in the desert that was, you know, 30- or 40,000 years
14 old, older than the commonly-accepted date of human
15 entrance into North America, you wouldn't find anything
16 buried in it, everything would be on the surface.

17 Another context, if you're along water lane
18 deposits along a water course that had been there for a
19 while, it's possible that you'd have buried resources
20 there. And in that case the archeologist typically would
21 want the opportunity to be able to not only observe the
22 surface but to excavate and to get an idea of what the
23 subsurface character of that land form to see whether or
24 not there was anything there.

25 So at the end of the day, based on the very small

1 sample that archeologists use to do evaluation phase
2 investigations, the archeologist would be able to
3 summarize and give you an idea of what they thought the
4 likelihood that there was, you know, further buried
5 deposits, including buried human remains there. But you
6 really can't get to a definitive place; you know, that can
7 always be a surprise for one.

8 MS. MILES: And what would you say would be the
9 best way to treat any human remains or human cemeteries
10 that might be found to be present within the project area?

11 MR. McGUIRT: There is a whole slew of state and
12 federal regulations about how those are to be handled when
13 they're discovered and --

14 MS. MILES: Well, specifically under CEQA.

15 MR. McGUIRT: Under CEQA. It would be compliance
16 with all the state regulations that were involved in the
17 discovery of human remains and contacting county coroner's
18 and getting them to come out and look at it and determine
19 whether or not they're prehistoric, and contacting the
20 Native American Heritage Commission and get a designation
21 of the most likely descendant and consulting with those
22 folks.

23 At the same time that we would be about doing
24 that, the BLM is also about -- since it's on federal land,
25 they're having to deal with implementing the plan of

1 action which was referred to earlier, which is called
2 NAGPRA, to deal with those situations.

3 So there would be quite a lot of activity around
4 that that would be very heavy on Native American input.
5 In fact, that would be critical to the whole -- all
6 processes under both the state and the federal
7 regulations.

8 MS. MILES: Is it a fair statement to say that
9 CEQA would prefer preservation in place as the preferred
10 mitigation?

11 MR. MCGUIRT: That's what it says in the CEQA
12 guidelines.

13 MS. MILES: Just the last couple of questions.

14 Finally, in your testimony you say that it is an
15 unavoidable consequence of the accelerated schedule to
16 which this licensing process has been and continues to be
17 subject, that there will have been insufficient time to
18 develop a thoughtful and integrated cultural resources
19 avoidance plan for the present configuration of the
20 project area.

21 And can you talk a little bit about that? Like
22 what is the Impetus for the accelerated schedule?

23 MR. MCGUIRT: What is the what?

24 MS. MILES: Impetus for the accelerated schedule.

25 MR. MCGUIRT: You would have to ask our

1 management about that. I don't know.

2 MS. MILES: So it's a directive from your
3 management.

4 MR. McGUIRT: We operate under the schedules
5 we're given.

6 MS. MILES: So it's not, to your knowledge,
7 related to any CEQA compliance matter.

8 MR. McGUIRT: I couldn't comment on that.

9 MS. MILES: The staff assessment concludes that
10 the high number of cultural resources for the project
11 renders the evaluation of all known resources infeasible,
12 correct?

13 MR. McGUIRT: Say that again, please.

14 MS. MILES: That due to the high number of
15 cultural resources for the project, that the evaluation of
16 all known resources is infeasible.

17 MR. McGUIRT: In what time frame?

18 COMMISSIONER BYRON: Mr. McGuirt, I know that
19 you're answering Ms. Miles's questions, but we have a lot
20 of people on the line that really would do well to hear
21 you speak directly into the mic.

22 MR. McGUIRT: Excuse me.

23 MS. MILES: The page number, so that you can see
24 exactly what I'm referencing, is C.3-131.

25 MR. McGUIRT: Okay.

1 MS. MILES: And I was asking -- I was pointing
2 out that the staff assessment concludes that the high
3 number of cultural resources for this project renders the
4 evaluation of all known resources infeasible.

5 MR. McGUIRT: Can you tell me what paragraph
6 you're in, please?

7 MS. MILES: Okay. So it's at the end of the
8 second paragraph.

9 MR. McGUIRT: Yeah, that's -- the time frame for
10 that is the licensing process. And as cultural resources
11 staff, for us, under a typical natural-gas fired license
12 consideration, you may have a handful of cultural
13 resources; you may have, you know, six, eight, nine,
14 cultural resources. And with that small number of
15 resources, it's completely feasible in the 12-month
16 regulatory cycle that our licensing process is supposed to
17 operate under to get in and identify, evaluate completely,
18 assess effects, and come up with mitigation measures for
19 that.

20 On a project of this size where you have
21 literally hundreds of cultural resources, the amount of
22 time that it takes to go out in the field and survey that
23 big of an area, to actually do a Phase 1 or just the basic
24 inventory, the basic description of those resources, to
25 come back and discuss that, then to go back out in the

1 field and do evaluation phase investigations, which
2 typically involve excavation of some sort, to collect that
3 information, get back in the laboratory, analyze all the
4 material culture, write that up, then have discussions
5 about whether or not things are significant or not, and
6 then to assess the effects and go on and do the whole
7 schmeer, it's infeasible to do that basically in a
8 12-month cycle.

9 And by -- as a counter-comparison, I have a lot
10 of colleagues that have and do work at Cal Trans. And
11 when Cal Trans goes and has a project where they're going
12 to have, you know, a road project, they figure from the
13 beginning to completing the environmental review process
14 for cultural, depending on what's out there, you know,
15 assuming that they have something that may be significant,
16 they look at three-to-five-year time frames to get through
17 that process.

18 And so what we have here doesn't accommodate
19 that, and so we have to deal with what we have, you know,
20 the time frames that we do have.

21 MS. MILES: And starting from when this AFC was
22 filed, how long did it take for you to get a complete and
23 accurate inventory of the resources on the project site?

24 MR. MCGUIRT: We spent about a year and a half to
25 a year and three quarters discussing the level of

1 information that was going to be necessary to help us get
2 through this planning process. And that started in about,
3 for us, November of 2007. And by June of 2009, we had
4 made the decision, "we" being the BLM, and the energy
5 commission and with some buy-in from the applicant, that
6 given the very large size of the cultural resource base in
7 this project area, that if we had a really good
8 representative sample of the resources in the project
9 area, that we could proceed with developing our
10 environmental -- our joint environmental document on that
11 basis. So that's the point in time in which we came to
12 the agreement amongst ourselves that we would go for a
13 25-percent sample, which is what we did.

14 And the applicant went back in the field, and
15 using field protocols that we had written, "we" being the
16 BLM and the energy commission, and using a template that
17 we had developed between the BLM and the energy commission
18 for how they would describe these sites, they went back in
19 the field. And I believe they concluded that effort
20 towards the end of September 2009, for that 25 percent
21 sample. And they produced a report.

22 And off the top of my head, I can't remember
23 exactly when we got it. It was like late October, early
24 November of that year, we got the report on that
25 25-percent sample.

1 And then concurrently -- and that's what we've
2 based our analysis on, was that sample. And concurrently
3 they went back out in the field and applied the same field
4 protocols and the same template to recording the other 75
5 percent of the site.

6 And I personally was gone during the month of
7 June this year on vacation. I understand that that report
8 for the other 75 -- actually the combined report for the
9 whole hundred percent came out in June.

10 But we -- like I said, we have based the energy
11 commission staff analysis on the 25-percent sample that we
12 got a report on in late October, early November of last
13 year.

14 MS. MILES: And can you give me an estimate of
15 how long it would take to evaluate the significance of the
16 sites in that 25-percent sample?

17 MR. McGUIRT: I can give you a bald guess. It's
18 not a firm guess, so don't -- don't hold me to this. But
19 you know, reasonably, depending on the complexity of the
20 sites that they found once they got into them, I think it
21 would be reasonable to anticipate that you would have
22 somewhere at least in the 18- to 24-month time frame, if
23 you include the logistics involved in preparing and
24 getting approved a research design to do all that work,
25 mounting the field crews to go do the work, actually

1 getting in the field and doing the work, collecting all
2 the materials, hauling them back into the lab, cleaning
3 them up and preparing them for analysis, getting them
4 analyzed, and then writing up all the reports, and having
5 those reviewed and approved by the appropriate parties.
6 It's a very involved process.

7 MS. MILES: And how far along are you in that
8 process of evaluating?

9 MR. McGUIRT: At this point I could not tell you
10 because the BLM at this point is in charge of what's
11 happening between now and the time the decision's going
12 on, and I don't know what that is.

13 MS. MILES: But the energy commission will be
14 stepping in and making its own evaluations; is that
15 correct?

16 MR. McGUIRT: The BLM -- as we get closer to the
17 decision, the BLM and the CEC, along with all the other
18 consulting parties in the PA process, will be working
19 towards having that happen.

20 MS. MILES: And that will happen before
21 construction is allowed to take place on the project site?

22 MR. McGUIRT: It will happen before construction
23 happens in particular places on the project site.

24 So for instance, they have this Phase 1-A that's
25 out; so all of this work will be done in that Phase 1-A

1 area before they go to construction. The BLM, as I
2 understand it -- and I don't represent the BLM -- will not
3 give them a notice to proceed to do Phase 1-A until that
4 work has been done.

5 MS. MILES: Thank you.

6 No further questions.

7 HEARING OFFICER RENAUD: All right. Let's see.
8 Cross-examination from Mr. Budlong.

9 Are you there?

10 Okay. Any redirect, Mr. Babula?

11 MR. BABULA: Couple questions here to clarify
12 things.

13 REDIRECT EXAMINATION

14 MR. BABULA: So you testified that the preferred,
15 CEQA-preferred mitigation is avoidance. Has the applicant
16 avoided a number of resources?

17 MR. MCGUIRT: One of the things that we do point
18 out in the staff assessment is in the prefiling phase of
19 this project, the original version of this project, I
20 believe, was envisioned to be a 900-megawatt project. And
21 on the basis of the results of their initial foray out
22 into doing the inventory of the cultural resources, the
23 applicant discovered that there was a very heavy, very
24 complex cluster of archaeological sites along what was
25 then envisioned to be the eastern portion of the project

1 area.

2 The reason for that was that eastern portion of
3 the project area originally lapped over the former
4 shorelines of ancient Lake Cauhilla where, in
5 archaeological terms, one would expect to find a lot of
6 cultural resources that were indicative of the
7 exploitation of that lake when it was full.

8 And so in consultation with the applicant, I
9 believe that was in the late winter and early spring of
10 2008, the applicant made the decision to exclude a large
11 portion of what they had originally envisioned the project
12 to be, and then diminished what they projected their
13 generating capacity to be from 900 to 750 megawatts.

14 And I do think it's important when applicants
15 make that effort, that that gets recognized way down --
16 two years down the road somehow that gets lost, but that
17 is a significant portion of their generating capacity that
18 they did set aside once they understood what they were
19 into, and they did do that.

20 MR. BABULA: Can you just briefly explain the
21 difference between like an archaeological site and an
22 ethnographic resource, because we had some questions from
23 CURE on that, and I just want to make sure we're clear.

24 MR. MCGUIRT: Cultural resources, be they an
25 archaeological deposit or a built environment resource,

1 which would be a building or a structure, some kind of
2 bridge or something like that, they can be significant for
3 different values. Archaeological sites not always but
4 typically are found to be historically significant because
5 they contain information that's important to history or
6 pre-history.

7 An archaeological site can also have associative
8 values. Under the National Register and the California
9 Register, one evaluates a resource's significance with
10 relative to four basic criteria.

11 And one is -- and I'm quoting these --
12 paraphrasing these roughly. One of them is for a
13 resource's associative values with events or patterns in
14 history or prehistory that are important. Another is an
15 associative value because a resource is associated with an
16 important person in history or prehistory. Others deal
17 with its association with an important architectural style
18 or a master of some kind that's produced something. And
19 the last one of which is an information value issue. That
20 it has something -- either has or has the potential to
21 contribute information that's important to history or
22 prehistory.

23 So you can have a single cultural resource, take
24 an archaeological deposit, that can be significant for
25 several different types of -- for several different types

1 of values. One would be an information value. It could
2 also be important for its associative value. An
3 archaeological deposit, say, just picking one, Custer's
4 Last Stand, I mean, there you have an archaeological
5 deposit; all that's left are musket balls and ammunition
6 pieces and pieces of wagons and horse tackle and so
7 forth -- horse tack. That's important for its associate
8 with that -- in that event in history as well as in the
9 information it may provide us. And so that can happen
10 with any one of a number of different resources.

11 In our case on this project here, you have
12 archaeological sites, one component or one element of
13 which may be these human cremations. So from the point of
14 view of an archeologist, there's a lot of good information
15 there that's significant because we don't have this
16 information through any other means about what occurred at
17 these places on the landscape in the past.

18 The Native American groups also have an
19 associative value with the same cremations that the
20 archeologists find interesting for their information
21 value. And so the Native Americans find that it is a very
22 important part of their heritage, that the resource is
23 sacred to them, and it's important to them culturally
24 because it's associated with patterns in their history.

25 And so we have to look at the effect of the

1 project not only on its information value but also on its
2 associative value. And so that requires, frankly, a
3 rather tedious analysis of going through and saying, okay,
4 the project is going to have this impact on its
5 information value, here's how we are -- it's significant
6 information, it's going to be a significant impact, and
7 here's how we're going to try to mitigate for that to
8 reduce that particular effect to less than significant.

9 One then also has to go back and look at the
10 associative values and how -- what is the impact to these
11 cremations from the associative point of view, and those
12 can be visual as well as direct. And if there's a visual
13 impact there that's going to be significant, then we have
14 to come up with a whole other set of mitigation measures
15 that takes that into account and treats the effects to
16 that associative value as opposed to the information value
17 that the archeologist may be interested in.

18 I know that's about as clear as mud, but you have
19 to go through and look at the different values for which
20 any individual resource can be significant. And you also
21 have to look at the integrity -- each of those associative
22 values have to be able -- the resource has to be able to
23 convey that information value, it has to be able to convey
24 that associative value.

25 And under both the National Register and the

1 California Register programs, there are seven elements of
2 integrity: Setting, feeling, association, design, there's
3 a list of them. And so the effects that the project may
4 have on these values impact the degree to which there's an
5 integrity there. And so as you develop these mitigation
6 measures, you're looking at specifically how the project
7 is affecting the integrity of the resource. And so as you
8 can imagine, it can be kind of cumbersome.

9 MR. BABULA: Does the staff assessment in the PA
10 address unexpected discoveries?

11 MR. MCGUIRT: Yes. As part of a normal siting
12 case for us, we always have monitoring and -- monitoring
13 and discovery provisions in our normal process and our
14 normal conditions for certification, and so does the PA
15 that we have developed here. There will be a monitoring
16 and discovery plan that is one of several different plans
17 that are tiered off of this programmatic agreement that
18 will address compliance with both state and federal
19 regulations in relation to discovery of human remains.

20 MR. BABULA: All right. Last question.

21 As a cultural resource expert and specialist,
22 given everything, all your knowledge of the project, your
23 knowledge of the time frames, the efforts the applicant
24 has made, working with the BLM, working with the Native
25 American groups, do you feel that the staff assessment and

1 the PA adequately handle the potential impacts and have --
2 the mitigation that can be developed through the PA system
3 is sufficient given the whole, you know, that you're not
4 taking this in a vacuum, but given the whole environment
5 of moving forward with this project?

6 MR. MCGUIRT: I do believe that in the course of
7 our going on almost three years' work on this project with
8 the BLM and with the applicant and with our other
9 consulting parties, that we have reached legal sufficiency
10 under CEQA. We understand what our population of cultural
11 resources are in the project area, we understand what the
12 effects to those resources are going to be, and we have
13 provided a very detailed and inclusive process to help us
14 to reduce those impacts to the degree that are feasible as
15 we move forward with this project, not in a vacuum, but in
16 consultation with the public, tribes, other state and
17 federal agencies.

18 MR. BABULA: No further questions.

19 HEARING OFFICER RENAUD: All right.

20 Any questions by any party?

21 MS. FOLEY GANNON: No questions.

22 HEARING OFFICER RENAUD: Commissioners?

23 No?

24 Commissioner Eggert, are you there?

25 COMMISSIONER EGGERT: Still here.

1 This has been a good discussion. No questions.

2 HEARING OFFICER RENAUD: All right. I have some,
3 if I may.

4 Let me ask you which other of the solar projects
5 you are the -- that are before the energy commission that
6 you are the cultural resources expert on.

7 MR. McGUIRT: Ivanpah, Beacon, this project, I've
8 been involved with Calico, I'm not the prime on it
9 anymore, but I'm still working in an advisory capacity on
10 Calico. And having been the supervisor of the cultural
11 resources unit in the winter, and in the spring I've had
12 my hand in the I-10 corridor projects as well.

13 HEARING OFFICER RENAUD: Okay. And of the four
14 you listed, or three, Ivanpah, Beacon, and Calico, are any
15 of those on BLM land?

16 MR. McGUIRT: Ivanpah is, it's on the Needles
17 field office resource area, right out of Las Vegas. And
18 then the Calico is in the Barstow field office area.

19 HEARING OFFICER RENAUD: Okay. So you're
20 familiar with Blythe I take it, Genesis, and Palen as
21 well.

22 MR. McGUIRT: Yes, sir.

23 HEARING OFFICER RENAUD: All right. Comparing
24 any of those projects with which you're familiar with the
25 cultural resources at the sites, would you characterize

1 the Imperial site as having more, less, or about the same
2 or some other -- in terms of density, quality, and so on,
3 of cultural resources? If you can do that. That might
4 not be a question that can be answered by an expert in any
5 reasonable fashion, but if you think you can.

6 MR. McGUIRT: Well, you're saying relative to one
7 another, correct?

8 HEARING OFFICER RENAUD: Yes.

9 MR. McGUIRT: Relative to one another, that's
10 easy. There is an awful lot of resources at Imperial.
11 It -- I think the next most densely populated, if you want
12 to call it that, project area with cultural resources
13 would be Calico. And they have about -- they have
14 actually less than half. So -- and in a larger land area.
15 So this is quite an extraordinary number of cultural
16 resources.

17 HEARING OFFICER RENAUD: Okay.

18 MR. McGUIRT: And as I recall, the figure that
19 we've been kicking around is, in fact -- that the number
20 of cultural resources that we have in this one project
21 area exceeds all the cultural resources that the energy
22 commission has dealt with to date.

23 HEARING OFFICER RENAUD: And how was that
24 determined, that it's so much more dense?

25 MR. McGUIRT: It's a cocktail party guess, but

1 it's pretty dog-gone close, because in most cases, like I
2 said, you may have six, seven, eight resources, and, you
3 know, because our natural-gas fired licenses typically are
4 in the 20- to 80-acre range as you know, and we're talking
5 about thousands and thousands of acres. And so, you know,
6 on a typical natural-gas fired plant, you would have a
7 very small number of resources, and that's typically all
8 we've done.

9 I mean, these large, you know, 5- to 10,000-acre
10 projects are unheard of. And cultural resources, as far
11 as I understand, I've been here only three years at this
12 point, but I understand that the cultural has previously
13 not been a great big issue. And a lot of people around
14 here are like, where did cultural come from and why? And
15 it's because well, we have these huge land areas that
16 we're dealing with. And so it's -- it's an extraordinary
17 number of resources that we're trying to cope with on this
18 project.

19 HEARING OFFICER RENAUD: I guess my question was
20 how did you determine that this, compared with the others,
21 is denser in cultural resources. And I understood your
22 answer really to be that it's a guess. Is that it?

23 MR. MCGUIRT: You mean on this particular
24 project?

25 HEARING OFFICER RENAUD: Yes, your comparison,

1 your judgment of comparison.

2 MR. McGUIRT: We know what the number of cultural
3 resources are on the Ivanpah project, the Beacon, the
4 Calico, and so forth, and just by looking at an
5 apples-to-apples comparison of the number of resources,
6 and if you wanted to, we could look at the frequency of
7 those resources per acre, it is demonstrably empirically
8 extraordinary on this particular project.

9 HEARING OFFICER RENAUD: All right. And that's
10 on a per-acre basis.

11 MR. McGUIRT: Yes, sir.

12 HEARING OFFICER RENAUD: Okay. Good.

13 Now, the -- we heard from Rebecca Apple about the
14 conditions of certification, or in this case the condition
15 of certification, and her explanation of why she wasn't
16 recommending any more than that.

17 Did you hear that testimony?

18 MR. McGUIRT: I did.

19 HEARING OFFICER RENAUD: Do you agree with it?

20 MR. McGUIRT: Yes, I do.

21 HEARING OFFICER RENAUD: Have you seen the FEIS,
22 the cultural section?

23 MR. McGUIRT: I have not.

24 HEARING OFFICER RENAUD: So you -- you're not at
25 all familiar with the conditions of certification in the

1 FEIS for cultural?

2 MR. MCGUIRT: No, sir.

3 HEARING OFFICER RENAUD: Well, let me read you
4 something from it and see if you agree with it. The BLM
5 in the FEIS has recommended 11 cultural conditions of
6 certification. And they're obviously aware of the
7 progress of the PA. And they include it as an appendix,
8 in fact. Let's see.

9 But they do say that "Implementation of measures
10 CUP 1 through CUP 11," and I don't expect you to know what
11 those are, "subject to the consultation process for the
12 development of the PA, would reduce or resolve adverse
13 effects due to project construction for the
14 agency-preferred alternative," and a number of other
15 alternatives that they list.

16 Do you have any reason to think that adding a set
17 of cultural conditions of certification similar to what
18 were used, say, in the Blythe solar project or Ivanpah,
19 which you're familiar with, would be advisable,
20 inadvisable, for Imperial, and why?

21 MR. MCGUIRT: The circumstance that we have been
22 trying, "we" being the BLM and the energy commission
23 staff, have been trying very hard to avoid, as I mentioned
24 earlier, is to get to a place in the decisions for our
25 respective processes, you gentlemen for the license to

1 operate and -- build and operate the plant, for the BLM to
2 issue the right-of-way grant. We did not want to get into
3 a position where the BLM was going to require one thing
4 and we were going to require another, which would put the
5 applicant in the position of having to mediate between
6 what could be disparate sets of mitigation measures.

7 And so one of the main purposes of this PA
8 process and our use of the PA process is to try to have
9 the outcome of one understanding, one mitigation package,
10 and to make this quicker, more efficient, and ultimately
11 to make compliance more feasible by the applicant.

12 The caveat that is in the FEIS that you just read
13 me that says subject to consultation, that is a
14 tremendously huge caveat, because in the Section 106
15 process, the BLM, even as the lead agency, does not have
16 the right really to unilaterally impose its will on the
17 outcome of that process. They direct it, they mediate,
18 they arbitrate, they can introduce ideas, but to the
19 extent feasible and possible the outcome that they want to
20 see so that they -- a defensible Section 106 process, is
21 to be able to demonstrate that the outcome of that process
22 is something that the major parties are in basic agreement
23 to.

24 So I -- what they introduce in the FEIS are some
25 possibilities that still have to go through a pretty

1 serious vetting process, which is the consultation process
2 itself.

3 We thought long and hard on the I-10 projects
4 before we drafted our own conditions of certification for
5 the very reason that we were looking at a scenario in
6 which the BLM was going to come out with a programmatic
7 agreement for each of those projects, the outcomes of
8 which the energy commission may have had, you know, some
9 input into but not really a lot of say in; and yet we
10 needed to be able to demonstrate that we had thought about
11 what the effects of the projects were going to be and how
12 we were going to mitigate it, and so that our mitigation
13 measures that we came out with for those three projects
14 might be in conflict with the outcome of the programmatic
15 agreements, and we were going to be in precisely the
16 situation that we didn't want to be in.

17 And we are working diligently right now with BLM
18 staff in the Palm Springs field office on those three
19 projects to try to reach some sort of concordance between
20 what we've come out with and what the end result may be.

21 So to introduce -- for us in this case to
22 introduce further conditions of certification, if we did,
23 they would be really nothing more than to bring
24 suggestions to the consultation under 106 at best, and at
25 worst it could put us in conflict with the BLM or other --

1 the other consulting parties in the process.

2 HEARING OFFICER RENAUD: What if the conditions
3 were the same ones that the BLM has placed in the FEIS;
4 then you wouldn't be in conflict, would you?

5 MR. McGUIRT: No, we wouldn't be in conflict, but
6 I would have a hard time understanding if they've already
7 done that and they're going to introduce that in the 106
8 project as suggestions anyway, and that's really all they
9 are, is suggestions, it's not like a proposed condition of
10 certification, why would we want to do that?

11 HEARING OFFICER RENAUD: All right. The
12 committee is very, very interested in this topic of the
13 conditions of certification. Obviously we're concerned
14 about preparing a legally-defensible and adequate
15 document. And whether or not to include these -- some set
16 of conditions of certification that have -- that are
17 certain at this point as opposed to a PA which has not
18 been fully agreed upon is an issue for us.

19 I would like you to review the conditions of
20 certification in the FEIS, CUP 1 through CUP 11, not
21 instantly, but soon, and then come back in here and tell
22 us about them, tell us what you think.

23 Can you do that?

24 MR. McGUIRT: Yes, sir.

25 HEARING OFFICER RENAUD: Yes, today, for sure.

1 Maybe after lunch. I'm sure we have -- I know we have
2 another cultural witness. They're not terribly long, I
3 can tell you that. And I imagine with your experience it
4 won't take you too long to come to some decision about
5 them. But what we'd like really to know is do you have
6 any criticism of them, and if so, what, and would staff
7 recommend adding those conditions of certification to the
8 PMPD.

9 MR. MCGUIRT: Yes, sir.

10 HEARING OFFICER RENAUD: Good. Thank you.

11 Now, alternatives. You looked at a number of
12 alternatives in your analysis.

13 Did any of the alternatives that would result in
14 a project that is not the no-project alternative, did any
15 of them result in their being no significant impacts?

16 MR. MCGUIRT: No.

17 HEARING OFFICER RENAUD: Are you familiar with
18 the alternative that has been called the agency-preferred
19 alternative or the -- what's the --

20 MS. FOLEY GANNON: The LEDPA.

21 HEARING OFFICER RENAUD: The LEDPA. Thank you.
22 I know you didn't put it in your report.

23 MR. MCGUIRT: Not intimately familiar, but yes,
24 I'm familiar with it.

25 HEARING OFFICER RENAUD: All right.

1 MR. MCGUIRT: And I would have to pair it, what
2 Ms. Apple said earlier, generally a lot of the
3 alternatives seem to deal with the drainages and the
4 distance, you know from the drainages, a buffer around the
5 drainages. And as Ms. Apple pointed out, in general the
6 archaeological density is not particularly high along
7 those drainages, so that yes, there would be less of an
8 effect, but not significantly less of an effect for a lot
9 of those alternatives.

10 HEARING OFFICER RENAUD: Thank you.

11 Hold on for one moment.

12 Okay. Thank you very much.

13 Are there any other questions?

14 MS. FOLEY GANNON: I have one question.

15 HEARING OFFICER RENAUD: Go ahead.

16 REXCROSS-EXAMINATION

17 MS. FOLEY GANNON: Mr. McGuirt, you were talking
18 about the density of the resources found on this site.
19 And I think you said in earlier testimony you hadn't found
20 them though scattered equally throughout the site; is that
21 accurate?

22 MR. MCGUIRT: That's accurate.

23 MS. FOLEY GANNON: So did you find them in more
24 clustered areas?

25 MR. MCGUIRT: I wouldn't say clustered, but in

1 very gross terms, as you move from the western part of the
2 project area toward the east, the frequency picks up
3 considerably.

4 MS. FOLEY GANNON: And when you were comparing
5 the density of the resources found on the Imperial Valley
6 site to the other solar projects, were you considering the
7 larger project sites to the site that the -- the areas
8 that have been excluded now from the development, or are
9 you just looking now at the current development area?

10 MR. McGUIRT: The current one.

11 MS. FOLEY GANNON: Okay.

12 MR. McGUIRT: It still has an incredible number
13 of resources.

14 MS. FOLEY GANNON: Thank you.

15 HEARING OFFICER RENAUD: All right.

16 Any other questions?

17 All right. Thank you. And you've got some
18 homework.

19 MR. McGUIRT: Yes, sir, I do.

20 HEARING OFFICER RENAUD: Thank you.

21 All right. It's 12:00 noon, which would be a
22 good time to break. And we have a good reason up here to
23 take a break.

24 But, Ms. Miles, I know you have a witness
25 waiting. Would our taking a lunch hour at this point be a

1 hardship for your witness?

2 MS. MILES: So one hour for lunch, is that what
3 you're suggesting?

4 HEARING OFFICER RENAUD: Yes.

5 MS. MILES: Okay. Ms. Nash, are you on the
6 phone?

7 MS. NASH-CHRABASCZ: I am.

8 MS. MILES: Would that work for you?

9 MS. NASH-CHRABASCZ: That's fine.

10 MS. MILES: Okay.

11 HEARING OFFICER RENAUD: All right. Thank you
12 very much, Ms. Nash. We're sorry to keep you waiting, but
13 we'll be back here promptly at 1:00, and we'll take up the
14 testimony of Bridget Nash. See you at 1:00. Thank you.

15 Off the record.

16 (Lunch recess.)

17 HEARING OFFICER RENAUD: We were having problems
18 with the WebEx system, but it seems to be back.

19 Jennifer Jennings, are you there?

20 MS. JENNINGS: Yes, we're here.

21 HEARING OFFICER RENAUD: Good. So everything's
22 back to normal.

23 All right. Mr. -- I'm sorry, Jared --

24 MR. BABULA: McGuirt?

25 HEARING OFFICER RENAUD: -- Babula, you've

1 brought Mr. McGuirt back.

2 You've completed your homework?

3 MR. MCGUIRT: Yes, sir.

4 HEARING OFFICER RENAUD: All right.

5 Do you want to question, him or shall we just --

6 MR. BABULA: You can -- it was -- it was the
7 committee's question.

8 HEARING OFFICER RENAUD: All right. It's the
9 committee's question.

10 All right. Mr. McGuirt, have you had an
11 opportunity to review the conditions of certification from
12 the FEIS?

13 MR. MCGUIRT: Yes, sir, I have.

14 HEARING OFFICER RENAUD: All right. And what's
15 your opinion on it?

16 MR. MCGUIRT: It's really very interesting,
17 because the BLM has been adamant in the last six to nine
18 months as we've developed the programmatic agreements for
19 these different solar projects that the energy commission
20 not try to or appear to try to constrain the outcomes of
21 the consultations that are supposed to occur under 106.

22 They, the BLM, has expressed on a number of
23 occasions in a number of public meetings their concern
24 that both in the consultation process itself and by
25 putting out our own conditions of certification, that we

1 would be attempting to have more than our due influence in
2 the consultation process by constraining the outcomes.
3 And they have rejected robustly at every turn our attempts
4 to do that and insisted that we be one of any equal
5 parties in the Section 106 process.

6 It is interesting to me, therefore, that they've
7 turned around and done exactly the same thing that they've
8 been asking us not to do, which is to put out a set of
9 conditions that constrains potentially the outcomes of the
10 Section 106 consultation. So in essence, what I find
11 interesting is that you can say that what we have here
12 inadvertently or otherwise is a subversion of the 106
13 process that they so adamantly have been trying to
14 protect.

15 The 106 process that we have, and one of the
16 principles that they go over quite a bit about and is a
17 principle that comes from the Advisory Council on Historic
18 Preservation in Washington is there be an open
19 consultation when everyone comes to the table with ideas,
20 and we discuss these ideas and come up with various
21 solutions to the issues at hand. And by doing what
22 they've done, they're some -- I've read all 11 of these
23 measures, there are things in here, some of which are in
24 conflict already with what's in the draft PA. And the
25 draft PA at this point is not really -- it's moving

1 forward a final draft, it's getting very close to what the
2 executed document's going to look like. It says it is.

3 The Section 106 process, what consultation is
4 left to occur before its execution and then all -- the
5 agreement document itself is part process document, so
6 it's going to structure the way that the discussions
7 proceed after the decisions from both agencies about how
8 we come to various conclusions about what we're going to
9 do and -- I lost my train of thought.

10 Well, what's interesting is that, like I said,
11 they've sort of put in these conditions that they really
12 can't hold to, because if the 106 process is to remain
13 open and we're going to have these open discussions, and
14 there's many potential different outcomes, there's really
15 no vehicle for them to insist that these conditions be
16 enforced, because the consulting parties in the
17 Section 106 process may come to different conclusions than
18 are in these measures.

19 So if we were to include these as our conditions
20 of certifications to our license, we would be put in a
21 position to where we were also, in essence, subverting the
22 106 process post decision, and I think, as I understand
23 it, correct me if I'm wrong, we would be in a position
24 that every time that the outcome of that 106 process
25 deviated from these measures that they proposed here, we

1 would have to come back in and change the conditions.

2 HEARING OFFICER RENAUD: Where is there a
3 conflict with the 106 process in any of these?

4 MR. McGUIRT: Oh, lord.

5 HEARING OFFICER RENAUD: Just give me an example.

6 MR. McGUIRT: Okay.

7 HEARING OFFICER RENAUD: And that's the
8 consultation process, right?

9 MR. McGUIRT: Right.

10 HEARING OFFICER RENAUD: Pursuant to the PA.

11 MR. McGUIRT: In CUP -- does anybody know what
12 "CUP" stands for?

13 In CUP 3, paragraph 2 it's talking about how
14 they're going to deal with cremation, sort of in the
15 middle of that paragraph.

16 HEARING OFFICER RENAUD: CUP -- this is 3?

17 MR. McGUIRT: This is CUP 3, middle of the second
18 paragraph.

19 Okay. The HPTP, which is Historic Properties
20 Treatment Plan, shall also define any additional areas
21 that are considered to be of high sensitivity for
22 discovery of buried register-eligible cultural resources
23 including burials, cremations, or sacred features. This
24 sensitivity evaluation shall be conducted by an
25 archeologist who meets the secretary of the interior's

1 standards, blah, blah, blah.

2 I promise you that in consultation with the
3 Native Americans, they are not going to want to leave the
4 decision about what areas in the project area are high
5 sensitivity versus low sensitivity to a white
6 archeologist. They are very definitely going to want to
7 be involved in that decision. So we couldn't proceed like
8 that; that's going to have to be changed. And that's one
9 minuscule example.

10 HEARING OFFICER RENAUD: I understand. Okay.

11 Let me point you back to the beginning of these.
12 Above CUP 1. Do you see the paragraph there, it says
13 "Implementation of measures, CUP 1"?

14 MR. McGUIRT: Yes, sir.

15 HEARING OFFICER RENAUD: Okay. That reads,
16 "Implementation of measures CUP 1 through CUP 11, subject
17 to the consultation process for the development of the
18 programmatic agreement, would reduce or resolve adverse
19 effects," et cetera.

20 Does that phrase, "subject to the consultation
21 process for the development of the programmatic
22 agreement," alleviate your concerns?

23 MR. McGUIRT: Sure, from their standpoint. I
24 don't know how bound in their document, in their NEPA
25 document they are to these measures. That phrase there is

1 a qualifier that represents a humongous loophole, so much
2 so that it almost makes all the measures that follow
3 ineffective and meaningless because they don't really have
4 any standing relative to the rest of the Section 106
5 process.

6 So in their NEPA process, they may have the right
7 to, you know, modify their conditions a lot more easily
8 than we may, but as I understand ours, you know, once we
9 put these in as conditions, we're bound more or less to
10 act in that manner or come in and change them, which the
11 BLM may or may not be subject to. And so it makes me
12 wonder, all of the guidelines and the intent of these
13 measures that they have in here are already in the
14 programmatic agreement. That's -- but what we've been
15 discussing all along. So there's nothing in here that's
16 new, more novel.

17 HEARING OFFICER RENAUD: Why did they do this?

18 MR. MCGUIRT: I think they did to could cover
19 themselves legally. I think they've been open to the
20 criticism, as we were, that by referencing a PA, we don't
21 have, you know, the -- they're open to the criticism, I
22 think personally unfounded, that, you know, we haven't
23 specified mitigation measures. And so in order to cover
24 that criticism ahead of time, they've gone in and thrown
25 out all these measures to make it look like they have.

1 HEARING OFFICER RENAUD: All right. Do you have
2 legal training or expertise in CEQA law or any kind of
3 legal training in this area?

4 MR. MCGUIRT: No, I have no training by law. I
5 was a Section 106 regulator for six and a half years, and
6 for a time, for a year or so, I administered the
7 Section 106 program for the State of California. So I'm
8 very familiar with that for the SHPO. So I'm very
9 familiar with that.

10 HEARING OFFICER RENAUD: Okay. If attorneys at
11 the energy commission, or representing the energy
12 commission were to determine that -- I don't remember the
13 phrase you used, but the inclusion of specific conditions
14 such as these in addition to a reference of the still
15 draft PA was necessary for legal reasons, would you
16 recommend using these conditions?

17 Oh, oh, I want to get around your legal theories,
18 because they may or may not be correct, but you are the
19 expert on cultural resources and on conditions for those.

20 MR. MCGUIRT: Let me put it this way: There's
21 nothing in here, in these 11 measures, that gives me undue
22 heartburn that we couldn't work our way around them or
23 through them.

24 HEARING OFFICER RENAUD: Very good. All right.
25 Thank you.

1 Anybody have any questions for Mr. McGuirt about
2 this?

3 MS. FOLEY GANNON: No.

4 HEARING OFFICER RENAUD: All right.

5 MR. BABULA: I just have a quick one.

6 REDIRECT EXAMINATION

7 MR. BABULA: You indicated, Mike, that these
8 are -- basically the concepts here are already in the PA.
9 If the committee were to take these 11 conditions and put
10 them as a condition of certification in the PA, maybe not
11 word for word, but the concepts, does the staff assessment
12 and the PA that you put out support these 11 CUPs as a
13 condition of certification; that is, is there support in
14 the record for the committee to make these into conditions
15 of certification, like the basic concept of what each one
16 would be similar to, there is something here for like
17 avoidance, identify, and monitoring.

18 MR. MCGUIRT: In general principle, these
19 measures reflect a lot of what's in the PA and in the
20 staff assessment. And we've had the opportunity to do it,
21 and we just want to be able to, you know, offer the advice
22 to the committee, that were these to be conditions of
23 certification, please be advised that we will probably be
24 in here changing these a lot as the outcomes of the PA
25 process become known, and that that's just one pitfall for

1 the committee to consider.

2 HEARING OFFICER RENAUD: All right. That was a
3 good question. Thank you for asking that.

4 MR. BABULA: All right. No further.

5 HEARING OFFICER RENAUD: All right.

6 MS. FOLEY GANNON: One further follow-up
7 question.

8 HEARING OFFICER RENAUD: All right.

9 RECROSS-EXAMINATION

10 MS. FOLEY GANNON: Would placing some or all of
11 these in verifications rather than in the conditions, do
12 you think, address what the procedural concern that you're
13 raising?

14 MR. MCGUIRT: Off the cuff, to me these are
15 things that in theory would go in the condition itself
16 because it's -- this represents a more specific outcome to
17 some of the general principles that we have in mind in the
18 PA and that are actually in the PA. And so we would want
19 to verify that, you know, certain specific things had
20 occurred. So I don't see that that would help.

21 MS. FOLEY GANNON: Okay.

22 HEARING OFFICER RENAUD: All right. That's it?
23 Very good.

24 Thank you.

25 Okay. Ms. Miles, finally, we can get to your

1 witness.

2 MS. MILES: Ms. Nash, are you on the phone?

3 MS. NASH-CHRABASCZ: Yes.

4 MS. MILES: I believe that we need to have you
5 sworn in at this point.

6 MS. NASH-CHRABASCZ: Okay.

7 (Bridget Nash-Chrabascz was sworn.)

8 DIRECT EXAMINATION

9 MS. MILES: And whose testimony are you
10 sponsoring today?

11 MS. NASH-CHRABASCZ: Mine. My opening testimony
12 with the exhibits.

13 MS. MILES: And let the record reflect that
14 that's Exhibit 498V through 498Z. And I'd like to move
15 those into the record. Would now be an appropriate time?

16 HEARING OFFICER RENAUD: Yes, it would.

17 Is there any objection?

18 MS. FOLEY GANNON: When were those filed?

19 MS. MILES: Those were filed originally, I
20 believe, in May; I can't remember the date, May 10th
21 perhaps.

22 MS. FOLEY GANNON: Okay. Thank you.

23 No objection.

24 HEARING OFFICER RENAUD: All right. That's fine.
25 They're admitted. I think they probably already were, but

1 that's fine, it can't hurt.

2 (Intervenor CURE's Exhibits 498V through 498Z
3 were received into evidence.)

4 MS. MILES: And do you have any changes to your
5 sworn testimony?

6 MS. NASH-CHRABASCZ: No.

7 MS. MILES: And are the opinions in your
8 testimony your own?

9 MS. NASH-CHRABASCZ: Yes.

10 MS. MILES: Since your resume was submitted quite
11 a while ago, a lot has happened since then.

12 Would it be all right if Ms. Nash summarized her
13 qualifications?

14 HEARING OFFICER RENAUD: Do --

15 MS. FOLEY GANNON: We stipulate to her
16 qualifications.

17 HEARING OFFICER RENAUD: Yeah, I'd prefer to do
18 it that way.

19 MS. MILES: Okay.

20 HEARING OFFICER RENAUD: We have a stipulation.
21 That's fine.

22 MS. MILES: Would you please describe for us what
23 it was that CURE asked you to do in preparing your
24 testimony?

25 MS. NASH-CHRABASCZ: CURE asked me to provide the

1 perspective of Quechan tribe regarding the consultation
2 process, the development of the PA, as well as the
3 project's impacts to cultural resources that are important
4 to the tribe.

5 MS. MILES: And what materials did you review
6 related to the project?

7 MS. NASH-CHRABASCZ: Well, since this has been
8 going on, I've reviewed both the staff assessment, the
9 Draft EIS, the draft programmatic agreement that's been
10 provided by the BLM, the comments from the Advisory
11 Council for Historic Preservation on the PA as well as the
12 comments from National Trust for the PA as well, the
13 supplemental staff assessment for the most part, however,
14 I haven't finished the entire thing, as well as several
15 other relevant documents that have come about in this
16 proceeding.

17 MS. MILES: And have you gotten a chance to look
18 at the technical report?

19 MS. NASH-CHRABASCZ: Yes. It's been a little
20 while since I reviewed it, but yes.

21 MS. MILES: Okay. Can you please provide a
22 summary of your conclusions about the project's analysis
23 of impacts to cultural resources and the proposed
24 mitigation strategies?

25 MS. NASH-CHRABASCZ: Okay. As currently defined,

1 the scope of the analysis, the area of potential impacts
2 is limited to the project area, and it really fails to
3 take into account in any meaningful way the impacts to the
4 adjacent ceremonial site.

5 The cultural landscape of the Quechan consists of
6 a myriad of natural and cultural features, intaglios,
7 geoglyphs, petroglyphs, trails, pottery scatters, lithic
8 scatters are just a few of the types of physical remains
9 that are visible today from past activities of the tribe,
10 some of which are located within the project area, others
11 outside. And while each of these features is impressive
12 within its own right, collectively they're part of a
13 larger landscape that includes ceremonial, travel,
14 habitation, as well as sacred places.

15 Unlike the archeologists who are limited by the
16 project's boundaries, the tribe views all of the land
17 forms like mountains as well as the cultural resources as
18 being interconnected. The cultural value of this
19 landscape has been well-known for years; in fact, the
20 cultural significance of the project area was previously
21 described in the discussion of the proposed Plaster City
22 CDCA in the 1980 Draft California Desert Conservation Area
23 Plan and EIS.

24 At that time the proposed CDCA, which included
25 the current project area, was described as having 8,320 --

1 (phone connection breaking up) -- as well as 26,680 acres
2 of --

3 MS. MILES: Ms. Nash, I'm sorry to stop you
4 there, but I was wondering if you could repeat the last
5 statement you made. There was a lot of static on the
6 line.

7 MS. NASH-CHRABASCZ: Oh, okay.

8 I don't remember where I was.

9 MS. MILES: It was relating to -- I think you
10 broke up when you were describing the number of resources
11 that had been described in the 1980 draft plan.

12 MS. NASH-CHRABASCZ: Okay. The proposed CDCAs,
13 the proposed Plaster City ACC, which was in the CDCA plan
14 of 1980, which also included the current project area,
15 which also included the current project area, was
16 described as having 8,320 acres of high sensitivity, high
17 significance, and 26,600 acres of high to very high buried
18 site potential that could be severely impacted.

19 In addition, possibly 1,125 prehistoric sites and
20 two National Register properties, which include eight
21 linear miles of historically-significant trails, also
22 stood to be disturbed or destroyed.

23 So the cultural significance of this area, the
24 cultural value of this landscape has been well known for
25 years. The project area that is proposed is extremely

1 rich in cultural resources, and while the tribe -- we just
2 received a copy of the cultural report in early July of
3 this year, 2010, the PA lists 442 cultural resources
4 listed in the project area. It -- the tribe has been
5 trying to make clear that the fact that damages or
6 removal, because the collection of sites has also been
7 proposed as one of the mitigation measures, that damage or
8 removal to one of these sites or more within the project
9 area is not only going to affect the resources located
10 within the project area, but those that are located within
11 the area, within this cultural landscape, like the
12 Yuha Desert, which is south of the project area, just
13 south of I-8. The cultural landscape cannot be
14 piecemealed, and they really need to be considered within
15 their entirety.

16 And this cultural landscape really has not been
17 evaluated yet, it has not been discussed. The analysis so
18 far has been heavily focused on the archaeological
19 resources, and what scientific information -- I know
20 Mr. McGuirt, you know, went through this earlier -- what
21 kind of scientific information can be gleaned from the
22 resources within the project area. I know he spent some
23 time touching on the associative value, and that has yet
24 to really be explored.

25 That really needs to come from the tribe, and to

1 sit down; but the current paradigm in which the
2 archeologists for the Imperial Valley Solar Project have
3 identified and bounded the site, as well as conducted the
4 eligibility recommendation, did not allow for tribal
5 input. The tribes were not out there assisting with
6 identifying and binding those sites together. And the
7 post project will allow large-scale commercial energy
8 development on lands known to be highly sensitive in terms
9 of cultural resources.

10 Given these concerns in regards to the project
11 area, to the adjacent land areas and to the TCPs, the
12 traditional cultural properties, it's not unreasonable for
13 the ethnographic study to be done to help inform the
14 process prior to the project being approved. This is one
15 way in which the tribes can really have some input into
16 that associative value of the site, to allow the tribes to
17 sit down and give their history and their knowledge of
18 these areas. It's imperative that the tribe have an
19 opportunity to share their cultural knowledge so that the
20 archeologists have a better understanding of both the
21 cultural and the ceremonial values of these resources.

22 If when the resources are evaluated for their
23 significance, they are determined to be ineligible --
24 usually with archaeological sites, especially prehistoric
25 sites, it's because of criterion that they're not going to

1 be able to yield anything to the data. It's important to
2 remember that it does not mean that the resources have no
3 value to the tribe or that they don't have value.

4 Mitigation for the project has pretty much been
5 relegated to a PA, which there's been some discussion
6 about, developed by the BLM. And the PA developed by the
7 BLM defers the formulation of mitigation to a time when
8 the project's alternatives will have already been chosen
9 and the project will be permitted. This deferral removes
10 the option of rejecting the project within the proposed
11 project area based on what is learned in consultation with
12 the tribe. It also severely limits the scope of avoidance
13 that can be done once the project is permitted.

14 The PA is also pretty limited in scope as it
15 focuses mostly on the cultural resources within the
16 project area, but California has to be a -- and for those
17 not here, the California desert is targeted for
18 substantial solar and wind energy development in addition
19 to the usual slate of mining, farming, irrigation, housing
20 projects. In fact, there's a minimum -- I was trying to
21 count them all, but there's a minimum of ten proposed
22 projects located either immediately adjacent to the
23 proposed project area, but up to ten miles both on federal
24 and private land. So this cultural landscape, this
25 fragile cultural landscape is really under attack.

1 It's obvious that the cultural landscape is being
2 diminished at a rapid rate through projects located on
3 public lands managed by BLM. However, while the final EIS
4 lists many, it doesn't list all of them, but it does list
5 many of the past, present, and reasonably foreseeable
6 projects on various lands near the project area. There is
7 no substantive quantification or detailed analysis of how
8 these projects in conjunction with the Imperial Valley
9 Solar Project are expected to impact the cultural
10 resources of the surrounding area or the broader
11 California desert conservation area.

12 I know that this tribe in particular has really
13 been pushing for sitting down, really discussing this, the
14 ethnographic study, visual simulation, as well as more
15 analysis on the cumulative impacts because they really
16 have not been discussed yet.

17 MS. MILES: Thank you, Ms. Nash.

18 I think you answered my next question, but just
19 to clarify, I understand that you're saying that -- and
20 you can correct me if I'm wrong, that the project area of
21 analysis is not -- is not broad enough; is that correct?

22 MS. NASH-CHRABASCZ: Yeah, no, it's not. It
23 really shouldn't have taken into account the ceremonial
24 areas that are sacred to the Quechan as well as to other
25 tribes south of the freeway. Especially if you're not

1 within cultural resources, it can be a really hard concept
2 to kind of grasp onto is the fact that all of these areas,
3 you know, the project area, the area to the south, the
4 Yuha Desert, areas further to the west, the east, and to
5 the north is all part of this continuous cultural
6 landscape that predates the freeway, it predates the homes
7 in this area.

8 In fact, there are trails that are located within
9 the project area that trend south. And if you go into the
10 Yuha Desert, you can pick up the trails, you can follow
11 them. Some of them start trending towards the southwest
12 over to another project area, which also contains a large
13 number of cremations where the Schneider Dance Circle is,
14 and some of the geoglyphs, some of the intaglios.

15 And so it really needs to be, the entire area --
16 just because the freeway is there, it doesn't mean that
17 all of a sudden that the importance has just stopped,
18 because it hasn't, and it really needs -- whatever happens
19 within this project area is going to affect the
20 Yuha Desert towards the south, what's happening in these
21 other project areas, they're all related, and they really
22 need to be -- especially since they're all connected,
23 since they're right on top of one another, they really
24 need to be analyzed all together for the cumulative
25 effects, because once this is happening, the cultural

1 landscape is going to be no longer.

2 MS. MILES: Thank you.

3 Has your tribe been given a sufficient
4 opportunity to consult on the project area of analysis
5 with the energy commission?

6 MS. NASH-CHRABASCZ: No. The energy commission
7 has not been in direct communication with the tribe.

8 MS. MILES: Well, how about with the BLM?

9 MS. NASH-CHRABASCZ: With the BLM, to date -- BLM
10 first notified the tribe of the Stirling Geotech project
11 back in February of 2008. The cultural committee invited
12 BLM after -- shortly after receiving the project
13 notification letter to a meeting here on the reservation.
14 BLM came over and sat down with the committee.

15 The committee then started asking questions of
16 well, if you move forward with this Geotech, what is the
17 next step? The committee at that time was concerned
18 about, well, the potential for large projects like where
19 we're at right now. And so the discussion began then.

20 After that, there has been very little
21 communication. There's been communication between myself
22 and BLM's archeologists, usually me requesting the
23 cultural report, at which point, you know, there's been a
24 lot of delay with the cultural report. At times I'll be
25 told, oh, well next month or next fall or next winter or

1 next spring, in two months; and we final received that,
2 like I said, the beginning of July of 2010. So it was
3 over two years of requesting the cultural report that we
4 finally received it.

5 MS. MILES: Can you describe briefly why it's
6 important for you to have the cultural report?

7 MS. NASH-CHRABASCZ: Well, having the cultural
8 report, it allows -- the process that we go through here,
9 it comes to me, and then I go through and I make notes,
10 and then I take it to the cultural committee.

11 To allow the tribes to meaningfully consult, it's
12 nice to have the report because then you have an idea of
13 what you're working with. You can say, okay, well there's
14 this -- these are the types of sites, these are the number
15 of sites. And then not only in addition to that, but they
16 usually come with a map, so you can lay it out.

17 There are some elders on the cultural committee
18 who cannot make it out into the field, so it's nice to
19 have this visual, to lay out a map and say, okay, these
20 are the types of sites, now, let's look at how it's laid
21 out. Is there a way to work with this or is there not?
22 And so without having that, it's really difficult to make
23 meaningful comment on a project when you don't really know
24 what you're talking about.

25 MS. MILES: Thank you.

1 And do you feel like you've had an opportunity to
2 consult on the determination of the significance of the
3 resources?

4 MS. NASH-CHRABASCZ: No, not to date. There's
5 been a lot of focus on the cremation. There's a --
6 recently, I know Rebecca mentioned there was a three-day
7 excursion. Because of my health issues, I wasn't able to
8 attend that one. But from what I understand, there was a
9 lot of focus at that meeting, there were other
10 representatives of the tribe there, and I understand the
11 focus of that meeting was focused on the cremation. And
12 so there's been a lot of discussion about how to handle
13 those cremations. But there's been very little discussion
14 or visitation to sites, like the trails, or some of the
15 other sites.

16 And so it's really hard to -- and I understand,
17 you know, BLM's wanting to focus on the cremations or, you
18 know, the applicant wanting to focus on the cremation, but
19 again, when you come back to that cultural landscape, you
20 really need to see everything as being connected, like a
21 puzzle. You have to have all of these pieces within there
22 in order to really understand what's going on.

23 And it seems as if, I mean, as far as
24 consultation is concerned, it just -- for the tribe, for
25 us -- and I know Mr. McGuirt had mentioned that last

1 spring one of the tribes had mentioned Signal and/or
2 Coyote Mountain, I'm not sure which one was referenced or
3 both, but I would say the first probably consult meeting
4 per, you know, Section 106, the first meaningful meeting
5 probably occurred this -- late this past spring.

6 There hasn't been a lot, like I said before,
7 there hasn't been a lot of on going dialog. There hasn't
8 been any real chance to sit down and really discuss this
9 landscape and what's going to happen to it. There hasn't
10 been an opportunity for tribes to really explain the
11 history.

12 And if the project was not being fast tracked, if
13 there wasn't this arbitrary deadline, what would typically
14 happen -- and I've been in several Section 106
15 consultations, and I've seen some that don't go as well
16 and others that go really well. Those that go really
17 well, you know, come and say, okay, well, we want to do
18 this, and sit down and talk with the tribes and say, okay,
19 what are your concerns? This is -- we've had this survey,
20 we know what's out here, what are your concerns?

21 At that point, you know, the tribe will sit down
22 and look at the resources that are on the project area,
23 connect those to other areas within, whether it be
24 mountains or to rivers or other sites that are located out
25 of the project site, and really go through the cultural

1 landscape to try and figure out what can be done, coming
2 early and really discussing and not having a set plan, but
3 really kind of letting the tribe lead the discussion as to
4 what they would like to see.

5 And if that had happened in this case -- and I
6 think we're now getting to that point where the tribes are
7 now starting, now that they have the reports, they've been
8 out to the site, again, it's one visit with many to come,
9 I think we're just at the beginning of the consultation
10 process.

11 I know some people say, well, when you send out
12 project notification letters or meeting notifications,
13 that constitutes consultation, but it really doesn't. It
14 needs to be meaningful discussion, it needs to be -- we
15 need to really have a conversation and really listen to
16 what the tribes are saying.

17 And in the course of this, and with all these
18 other solar projects, you know, while consultation is
19 unfolding within some of these projects that aren't fast
20 tracked, there have been tribes that have stepped up and
21 said, you know, we would like an ethnographic study, you
22 need to have this done. Well, in this case, there's not
23 time to do that prior to permitting the project.

24 Some tribes have requested visual simulation and
25 have had an opportunity to help develop those. And that,

1 again, has not happened within this one. I believe
2 there's some visuals, but if memory serves, it's more
3 related to the DeAnza Trail. And I know there was one
4 point within the Yuha, I believe it was the Yuha, I
5 believe it was the Yuha geoglyph that was picked, but it
6 wasn't because the tribe said we would like you to do
7 visuals from A, B, C, D, and E, it was because that was a
8 known point of reference and that's where it was coming
9 from. So I think consultation, for me, has just kind of
10 started.

11 MS. MILES: Thank you, Ms. Nash.

12 Is there anything else you wanted to add?

13 MS. NASH-CHRABASCZ: I don't think so. I'm
14 scrambling, I'm like looking through my notes, but I don't
15 think so.

16 MS. MILES: Okay. Thank you.

17 I have no further questions.

18 HEARING OFFICER RENAUD: Okay. Thank you.

19 Cross-examination by the applicant?

20 MS. FOLEY GANNON: No questions.

21 HEARING OFFICER RENAUD: Okay. Staff?

22 MR. BABULA: I was hoping to have more time.

23 You sure?

24 CROSS-EXAMINATION

25 MR. BABULA: I've got just a couple questions.

1 One is, do you know one way or the other whether
2 any Native American showed up at the informational hearing
3 for this project?

4 MS. NASH-CHRABASCZ: Which one would that have
5 been, when and where? There have been a lot of meetings.

6 MR. BABULA: Well, it would be the first --
7 generally there's a first workshop to sort of introduce
8 the project, that the applicant would present a
9 Powerpoint, and the committee would be there presenting
10 what the function is of the energy commission. But I
11 don't know what the specific date --

12 MS. MILES: I believe she was there.

13 MS. NASH-CHRABASCZ: I know I participated,
14 and -- sorry, but I mean with Blythe and all the ones
15 along 10, with all of these, it's -- I've either been
16 there physically or participating over the phone or I've
17 had to send comments via e-mail. So in some form we've
18 participated, but to be honest, I don't recall without a
19 date or location. I could look it up for you though.

20 MR. BABULA: Okay. Well, it was more if you knew
21 if there had been any Native Americans representing any
22 group there at that time.

23 MS. NASH-CHRABASCZ: Okay.

24 MR. BABULA: My next question is, so from your
25 testimony it appears your sense is there really hasn't

1 been tribal consultation. Now, Exhibit I of the draft PA
2 does have a section called "Documentation of Tribal
3 Consultation." So is it that it hasn't been sufficient?
4 There has been some consultation. Can you maybe critique
5 what this Appendix I, the shortcomings of it?

6 MS. NASH-CHRABASCZ: Okay. Like I said before,
7 consultation, and what's in there, any time a project
8 is -- if a project notification went out, you know, that's
9 listed as consultation, me having -- I have monthly
10 meetings with BLM. If on there within the meeting it's --
11 Stirling is on there, the SES II, the project is on there,
12 or the Imperial Valley, now it's called Imperial Valley,
13 sorry, if that's listed on there and say, you know, we
14 touched on it, oh, were there any updates, no there's no
15 updates, well, a meeting occurred, it was mentioned,
16 that's consultation.

17 For me, I've been with the tribe for four and a
18 half years, and prior to that, you know, I was on the
19 other end in the CRM, and I can see --

20 MS. MILES: I'm sorry, can you -- can you for the
21 court reporter, explain what CRM is?

22 MS. NASH-CHRABASCZ: Oh, cultural resource
23 management. It's a firm. Just going out and doing the
24 surveys and whatnot.

25 But I can see the shortcomings of consultations

1 because we used to know, you know, every time you talked
2 to somebody, you just write down consultation, but just
3 because I request documents or I receive a notification
4 for a meeting, does that really constitute consultation?
5 You're telling me about it, but there's no meaningful
6 dialog, there's no real discussion, you're not sitting
7 down with the cultural committee, a tribal council, you're
8 not sitting down within the community to get that history
9 of the area, to talk about that cultural landscape and
10 really try to understand how those sites relate to others
11 outside of the project area and what's going to occur not
12 only to those sites within the project area, but those
13 outside of it and how it's going to have impact to those.

14 I think -- and that really comes down to, you
15 know, sitting down. And it takes months. There's one
16 project where it just -- and the tribe just kind of
17 finished off on that one too. So it takes a lot of time,
18 it doesn't happen overnight, and that's why I say, we're
19 just now starting to get to that point.

20 And I know Mr. McGuirt had mentioned that one of
21 the tribes had mentioned -- had brought up -- it was
22 either Signal or Coyote Mountain this past spring. Well,
23 that's probably because for the first time it was sitting
24 down and talking about it; however, the consultations are
25 kind of limited because no longer is it the tribe saying,

1 okay, well, you know what, we're really concerned about
2 this, maybe, you know, we don't have issues with the
3 project, but we have issues with the project location.
4 That's kind -- (phone connection breaking up) -- top of
5 the table. And now it's, well, do you fence the site, do
6 you want us to collect the materials and put them in a
7 museum? You know, what do you want us to do with the
8 site? Do you want us to cap the cremations? Do you want
9 us to put dirt or concrete on top of them? And so it's
10 really come down to that, and that's really not in the
11 true spirit of consultation.

12 MR. BABULA: Okay. No further questions.

13 MS. FOLEY GANNON: I have a follow-up question.

14 HEARING OFFICER RENAUD: Let me check all the
15 other intervenors first.

16 MS. FOLEY GANNON: Sorry.

17 HEARING OFFICER RENAUD: Okay. Any other
18 intervenors? You on the phone, questions for the witness?

19 All right. Back to --

20 MR. BUDLONG: Yeah, Tom Budlong.

21 HEARING OFFICER RENAUD: Oh, Tom, yes, go ahead,
22 Mr. Budlong.

23 CROSS-EXAMINATION

24 MR. BUDLONG: Bridget, I just want to make sure
25 that if you had any more information you wanted to put out

1 that you haven't been specifically asked or if you wanted
2 to talk about individual feelings of the Native Americans.

3 HEARING OFFICER RENAUD: Mr. Budlong, we're
4 having a very hard time hearing you.

5 MR. BUDLONG: Doing the best I can again.
6 Let's try something else here. Try another one.
7 Hello. Tom Budlong again.

8 HEARING OFFICER RENAUD: Slightly better.

9 MR. BUDLONG: Slightly better.

10 Bridget, I wanted to make sure that there wasn't
11 any information left out that you have that perhaps you
12 haven't been asked, or perhaps you could transmit
13 individual feelings -- feelings of individual tribe
14 members that you've been talking to so that we can
15 understand how they're reacting to this situation.

16 MS. NASH-CHRABASCZ: Okay. There is a lot of
17 concern, like I mentioned before; there are numerous
18 projects that are coming, it's not just on BLM, it's not
19 just on federal land, but also within private lands.
20 We've been getting notices from Imperial County as well.
21 There are a lot of projects happening within this area.

22 You have, within that one, there's a proposed
23 solar project directly to the north, you have Wind Zero,
24 which is being proposed south on the western portion of
25 the Yuha Desert, there's a large wind scale project, and

1 then there are seven or eight other solar projects just
2 lying to the east on private land that are going to be
3 occurring, and then some further to the north.

4 And so there's a lot of concern that if this is
5 what's going to be happening, if consultation is being
6 reduced to project notifications and requests for
7 information, that this fragile cultural landscape, the
8 history of the tribe is not going to be there any longer.

9 And I know for the Quechan there have been
10 several elders or older tribal members that have been
11 taking -- have been taking the youth out to visit some of
12 these sites. There's -- some elders are concerned that
13 the youth are a little more focused on video games or
14 things like that, and so people are taking the youth out
15 back out into the desert to these sites and really trying
16 to relay the history of the tribe and get them to
17 understand the creation story and everything that's laid
18 out there. But it's going to be hard to do if, you know,
19 the wind projects go through, if all the solar projects go
20 through, if all these projects happen, then the western
21 portion of Imperial County is pretty much going to be
22 wiped out. So there is a lot of concern about that.

23 Or I have heard some tribal members both on the
24 cultural committee and off, that have attended meetings
25 with me or separately, that there is some concern that

1 there's not a real dialog as to what the tribes would like
2 to see done, that they're often presented with, well, do
3 you want us to fence it, do you want us to pick it up and
4 put it somewhere else like a museum in the repository,
5 immigration facility, do you want us to cover it up? And
6 some of the tribes are -- tribal members are extremely
7 concerned about that because they should be left in place.
8 They should not be picked up and moved.

9 And even CEQA touches on that, that, you know,
10 merely recovering the artifact and storing them doesn't
11 mitigate the impact because it's not in the same location,
12 it's not in the same context. And I hate to use a puzzle,
13 but it's the simplest way to think about it, is, you know,
14 you have this puzzle, and if we take away three-fourths of
15 that puzzle and hide them in a box somewhere, you're not
16 going to see everything. You're only going to have that
17 other fourth out there to look at.

18 So there are a lot of concerns that everything --
19 that the history's going to be gone.

20 MR. BUDLONG: Specifically, is there a concern
21 that their culture will be lost by this process going on
22 in the desert?

23 MS. NASH-CHRABASCZ: Sure. I think -- there
24 again, you know, it's not an overall consensus, just some
25 of the tribal members that I've interacted with, but there

1 is a sense that once it's gone, you know, you're going to
2 lose access to certain areas; there's that concern. And
3 then if it's not there, where are they going to take the
4 youth. Or for those ceremonies that are on going, where
5 do you go? How are you able to participate in this? So
6 there's quite a bit of concern.

7 MR. BUDLONG: Okay. Thank you.

8 No more questions.

9 MS. NASH-CHRABASCZ: Thank you.

10 HEARING OFFICER RENAUD: All right. Any other
11 party questions, intervenors?

12 No?

13 Okay. Go ahead.

14 CROSS-EXAMINATION

15 MS. FOLEY GANNON: When you were --

16 HEARING OFFICER RENAUD: On behalf of applicant.

17 MS. FOLEY GANNON: -- discussing meaningful
18 consultation, in the event that the tribe that you
19 represented or other tribal participants determine that
20 they think the site is not appropriate for development,
21 what would the meaningful consultation constitute in your
22 view?

23 MS. NASH-CHRABASCZ: Was the question what does
24 meaningful consultation constitute?

25 MS. FOLEY GANNON: What I'm trying to get at is

1 you have described a situation in which there may be sites
2 that you feel should not be developed, the resources on
3 them are as such that there should be no development
4 allowed. In that case, what would meaningful consultation
5 involve?

6 MS. NASH-CHRABASCZ: Meaningful consultation,
7 if -- okay, if you would have come and said the applicant,
8 or BLM, you know, the applicant through BLM, and sat down
9 and said, okay, we have this parcel of land, and we're
10 looking at developing it for "X," this is our idea, this
11 is where we would like to place things, this is how we'd
12 like to do it, and then these are the known sites, and put
13 those all out there and lay them out on a map, take people
14 out there to visit the area and also diagram out where
15 everything is going to be placed in relation to the site,
16 would allow the tribe to really sit down and really
17 understand, okay, how is this going to impact it, how are
18 we going to see it, if this is tall, because, you know,
19 there are some solar power towers, those can be extremely
20 tall, up to 400 feet in height, and, you know, having
21 those visual simulations and really trying to understand
22 how this is going to impact the resources both within the
23 area as well as outside and having the opportunity to
24 express those concerns and to have ongoing conversation
25 about it and working together; and I think that's the key,

1 is working together to try and figure out what can happen,
2 if the footprint needs to be reduced or if there is
3 another location.

4 I've been in some consultations where the tribe
5 has said, you know, it cannot happen in this area for
6 these reasons; however, you know, there's this other land
7 over here that was going to be used for another project,
8 and it didn't end up getting developed, we have no issues
9 with that.

10 So, you know, allowing for more options, allowing
11 for the tribes to develop from alternatives or develop
12 some ideas as well instead of being just handed a list and
13 saying, okay, now pick.

14 MS. FOLEY GANNON: And when you're referencing
15 working together, did I understand you to say that you do
16 now feel that there is -- the consultation is having some
17 meaningful consultation -- or conversation with the
18 tribes?

19 MS. NASH-CHRABASCZ: I think starting late last
20 spring, I think finally consultation started to kick off
21 is probably what I would say. From that point the tribe
22 had an opportunity, and this is maybe why Coyote Mountain
23 or Signal Mountain, whichever one was finally brought up,
24 because they finally had a forum in which all -- you know,
25 we've had several tribes now starting to come together,

1 and that really is the key, not just talking to one tribe
2 but getting a lot of the tribes together to really sit
3 down and discuss it.

4 And so it was brought up, and now finally there
5 were field visits. And so that's going to add to the
6 conversation. But there hasn't been a large meeting since
7 then to follow up on it. So I think it's just started.

8 MS. FOLEY GANNON: And before that time, are you
9 aware, did your tribe or any of the other participants
10 make a request to have such a meeting, or was there ever
11 any specific reference to the fact that this is what was
12 missing, that this is what needed to be responded to in
13 the ongoing dialog that occurred as part of the
14 consultation?

15 MS. NASH-CHRABASCZ: I can't speak for others,
16 but I can speak for the Quechan, and yes.

17 MS. FOLEY GANNON: You specifically asked for
18 things like a field visit and were told no?

19 MS. NASH-CHRABASCZ: We have specifically asked
20 for meetings with tribal council with the cultural
21 committee. Sometimes it would be deferred until the
22 cultural report came out, and it just came out. We have
23 requested site maps.

24 I can get dates for you if you'd like me to; just
25 let me go through this stack here.

1 We've requested site maps. And again, those were
2 deferred till the documents came out. So there have
3 been --

4 MS. FOLEY GANNON: But they responded to you when
5 the documents became available?

6 MS. NASH-CHRABASCZ: Sorry?

7 MS. FOLEY GANNON: They were provided when the
8 documents were available?

9 MS. NASH-CHRABASCZ: I've seen a map. I don't
10 specifically have it in my hands, but I know where I can
11 get it. I've been working on that, yeah.

12 MS. FOLEY GANNON: Okay. And just one final
13 question.

14 I know you said you've been involved in these
15 consultations many times and said that you're doing this
16 evaluation of the landscape meaningfully can take
17 considerable time. How much time do you think it would
18 take to do this on a site like this? I mean, are we
19 talking years?

20 MS. NASH-CHRABASCZ: It depends. It depends on
21 the conversation. Like I said, I've been in one where the
22 site -- the project area was much larger than this, and it
23 took a little over nine years to do. I've been on others
24 where it takes a year or so just to get people out to
25 visit the sites, to sit down and really have those

1 conversations. So it could, yes, it could take over a
2 year or more.

3 MS. FOLEY GANNON: Or nine years, right?

4 MS. NASH-CHRABASCZ: Yeah, the one was nine
5 years. But again, it was substantially larger and it had
6 some other issues.

7 MS. FOLEY GANNON: Okay. Thank you.

8 No more questions.

9 MS. MILES: I have a question on redirect.

10 HEARING OFFICER RENAUD: All right. Go ahead.

11 REDIRECT EXAMINATION

12 MS. MILES: Two questions.

13 Do you think that it's necessary for the energy
14 commission to analyze this project in the context of the
15 cultural landscape prior to project approval?

16 MS. NASH-CHRABASCZ: I do, I do. Without fully
17 understanding the cultural landscape, you're not really
18 going to be able to determine the level of impacts to the
19 cultural resources within the project area.

20 MS. MILES: And are you saying that it is
21 important for the tribes' recommendations for avoidance
22 and alternatives to be known and considered prior to
23 project approval?

24 MS. NASH-CHRABASCZ: I'm sorry, my phone cut out.

25 MS. MILES: No problem. I'll repeat the

1 question.

2 Are you saying that it is important for tribes'
3 recommendations for avoidance and alternatives to be known
4 and considered prior to project approval?

5 MS. NASH-CHRABASCZ: Yes. Yes. Especially
6 when -- you know, within consultation it helps to have
7 that dialog allowing the tribes to -- the tribes to come
8 up with some of their own alternatives or allowing them to
9 participate within the process I think goes a long way.
10 And there's some ownership in that, and I think that does
11 help.

12 MS. MILES: Thank you.

13 HEARING OFFICER RENAUD: Okay. Any other
14 questions?

15 MR. BABULA: I've got one.

16 RECROSS-EXAMINATION

17 MR. BABULA: Why didn't any Native American group
18 intervene in our process? We have a very open process
19 that could -- they could be sitting at the table from the
20 beginning. And if they felt that the process is leaving
21 them out, intervention was developed specifically to
22 ensure --

23 HEARING OFFICER RENAUD: I think we've got the
24 question. Why don't you just ask her why. That's the
25 question.

1 MS. NASH-CHRABASCZ: Yes. Okay.

2 Actually, I think -- I think there was some
3 confusion at first, because we were getting information
4 from BLM, and then we received like sporadic things from
5 the CEC. So I think there was some confusion as to who
6 was doing what, how this was working together.

7 But I know that we had actually considered
8 intervening within the process, but unfortunately, from
9 what I understand, becoming an intervenor is quite a
10 daunting task, and within my office, I'm the only person
11 within my office. And so there was some discussion on it
12 and it was decided to just continue to send out our
13 letters and to try and work with BLM on the project rather
14 than becoming an intervenor just simply because we didn't
15 have the resources to, you know, go through that process.
16 We didn't have the staff and we didn't have the resources.
17 I don't know about other tribes though.

18 MR. BABULA: But there was an awareness of that
19 probability.

20 MS. NASH-CHRABASCZ: Yeah, I think that we
21 received -- oh, I'm trying to remember who had e-mailed
22 this to me. Someone had e-mailed the intervenor, I don't
23 know, there's a notice to become an intervenor, but it was
24 a week out from the deadline. I believe there's a
25 deadline. I can pull up the paper for you if you'd like.

1 And so then it was to -- there was some
2 discussion with tribal council, and so -- and then that
3 was the result of it.

4 MR. BABULA: Thank you.

5 MS. NASH-CHRABASCZ: I think the lack of
6 understanding what that does, what the -- what the
7 possibilities of being an intervenor, I think, you know,
8 that would help as well.

9 MS. MILES: One quick follow-up question.

10 HEARING OFFICER RENAUD: Were you done,
11 Mr. Babula?

12 MR. BABULA: Yes, thanks.

13 HEARING OFFICER RENAUD: All right. Ms. Miles.

14 REDIRECT EXAMINATION

15 MS. MILES: Ms. Nash, did you submit comment to
16 the energy commission directly?

17 MS. NASH-CHRABASCZ: Yes. We've cc-ed several of
18 our letters to the energy commission.

19 MS. MILES: Thank you.

20 HEARING OFFICER RENAUD: All right. Any
21 committee questions? Commissioners?

22 I have some.

23 Ms. Nash, this is Raoul Renaud, I'm the hearing
24 officer, considered part of the committee.

25 And you are familiar, I believe, with the new

1 cultural resources report. I guess you said you hadn't
2 completely read it, but you looked at it, right?

3 MS. NASH-CHRABASCZ: Yes, I've reviewed the
4 cultural resources report.

5 HEARING OFFICER RENAUD: Do you have it there?

6 MS. NASH-CHRABASCZ: I don't have it with me
7 unfortunately. I took a box home over this weekend, and I
8 was told I can't lift anything right now.

9 HEARING OFFICER RENAUD: Oh, I'm sorry to hear
10 that.

11 Well, on page C.3-135 begins a section called
12 "Identification and Assessment of Direct Impacts on
13 Ethnographic Resources and Recommended Mitigation." Do
14 you recall looking at that section?

15 MS. NASH-CHRABASCZ: Not specifically, no.

16 HEARING OFFICER RENAUD: Okay. In that section
17 there -- well, I'll just read you a sentence from.
18 "Historic properties treatment plans, HPTP, for which the
19 PA provides, are to contain the exact measures that are to
20 mitigate the adverse impacts of the proposed action on any
21 ethnographic resources in the project area of analysis
22 that are found to be significant and determined to be
23 historical resources. The PA provides explicit mitigation
24 measures for three types of ethnographic resources in the
25 project area of analysis and includes performance

1 standards for each measure."

2 Does knowing that that's in the staff assessment
3 alleviate your concerns about whether or not ethnographic
4 resources will be given proper treatment?

5 MS. NASH-CHRABASCZ: No, no. The PA pretty much
6 defers everything until after the project's already
7 approved. And one of the -- one of the mitigations would
8 be, you know, for there to be avoidance, or, you know,
9 simply just not to have the project if it's determined to
10 be significant or it's going to cause some issues. And
11 unfortunately, once the project's already approved and
12 then you start evaluating this after the fact and you come
13 to that determination, then the only option is, well, the
14 project's already been approved, so now it's, well, what
15 can we do? So how can we handle this? Rather than just
16 saying, okay, well, you know what, because of all of this,
17 because of the significance of the impact, this project
18 can no longer move forward. But that's kind of being
19 pushed off until after the fact.

20 HEARING OFFICER RENAUD: So your expectation
21 would be that the consultation process would be -- and the
22 finalization of the PA provisions for ethnographic
23 resources would be complete and completely done before
24 construction began?

25 MS. NASH-CHRABASCZ: Yes, that's typically what

1 happens, yes.

2 HEARING OFFICER RENAUD: In the draft PA, what I
3 just previously read to you refers to the project area of
4 analysis. Are you familiar with what the extent of that
5 area is in the PA, the draft PA?

6 MS. NASH-CHRABASCZ: Yeah, the area of analysis
7 is for the project area.

8 HEARING OFFICER RENAUD: And does that extend
9 outside the footprint of the project?

10 MS. NASH-CHRABASCZ: The project area? No.

11 HEARING OFFICER RENAUD: The project area of
12 analysis as is used -- that term as is used in the PA?

13 MS. NASH-CHRABASCZ: No. It's my understanding
14 that the APE is the same as the project area.

15 HEARING OFFICER RENAUD: Well, all right. I
16 think I would refer you to, starting on page 10 of the
17 draft PA, a discussion of the definition of the area of
18 potential effects. And it includes -- it's a long list,
19 but cultural resources in the Yuha area of critical
20 environmental concern, any other -- any cultural resource
21 or location which has been included in the Native American
22 Heritage Commission sacred lands files or identified by an
23 Indian tribe, tribal organization, or individual through
24 consultation as having religious or cultural significance.

25 Does knowing that alleviate your concerns about

1 the PA addressing ethnographic issues outside of the
2 project footprint?

3 MS. NASH-CHRABASCZ: No, because, again, it
4 doesn't contain any meat. The analysis is yet to be done,
5 it's just deferring it till after project approval. And
6 the analysis really should occur prior to project
7 approval --

8 HEARING OFFICER RENAUD: Okay.

9 MS. NASH-CHRABASCZ: -- to really understand what
10 those impacts are and what you're really dealing with.

11 HEARING OFFICER RENAUD: All right. Thank you
12 for answering those questions.

13 Anyone else?

14 All right. You are free to go. Thank you.

15 MS. NASH-CHRABASCZ: Thank you.

16 HEARING OFFICER RENAUD: CURE, do you have
17 another witness?

18 MS. MILES: I do.

19 Is Ms. Nissley on the phone?

20 MS. NISSLEY: Yes, I am.

21 MS. MILES: We need to swear you in at this
22 point.

23 (Claudia Nissley was sworn.)

24 DIRECT EXAMINATION

25 MS. MILES: And whose testimony are you

1 sponsoring today?

2 MS. NISSLEY: My own testimony, rebuttal
3 testimony.

4 MS. MILES: And do you have any changes to your
5 sworn testimony?

6 MS. NISSLEY: No.

7 MS. MILES: I'm having trouble hearing you.

8 MS. NISSLEY: Oh, sorry.

9 MS. MILES: Okay. I'm not sure why, but we can't
10 really hear you, Ms. Nissley. So is there a way to speak
11 more directly into the phone or --

12 MS. NISSLEY: Is this any better?

13 HEARING OFFICER RENAUD: The last syllable of
14 "better" was really good. Can you do what you did for
15 that?

16 MS. NISSLEY: Okay. I'll try.

17 Is this better?

18 HEARING OFFICER RENAUD: That's good.

19 MS. NISSLEY: Okay. I'll just speak up.

20 MS. MILES: And let the record reflect that this
21 is Exhibit 499S is the testimony of Claudia Nissley. And
22 I'd like to move that into the record.

23 HEARING OFFICER RENAUD: Any objection to that
24 being admitted?

25 MS. FOLEY GANNON: No objections.

1 HEARING OFFICER RENAUD: All right. That will be
2 admitted then. Thank you.

3 (Intervenor CURE's Exhibit 499S was received into
4 evidence.)

5 MS. MILES: And should we just have her -- would
6 everyone like to stipulate to her qualifications?

7 MS. FOLEY GANNON: We will stipulate.

8 MR. BABULA: That's fine.

9 HEARING OFFICER RENAUD: So stipulated.

10 MS. MILES: Thank you.

11 Can you please briefly describe what it was that
12 CURE asked you to do?

13 MS. NISSLEY: CURE asked me to review, assess,
14 and professionally analyze and comment on the staff
15 assessment for Imperial Valley, the supplemental staff
16 assessment, the Draft EIS, and participate in the
17 consultation meetings for the development of the
18 programmatic agreement.

19 MS. MILES: Thank you.

20 And can you provide a brief overview of your
21 concerns with the project's impacts to cultural resources
22 as proposed?

23 MS. NISSLEY: Yeah. I have several concerns.
24 One is -- first of all, let me back up, and that is that
25 this area, as has been pointed out by previous testimony,

1 is very significant in terms of the number and type of
2 cultural resources that are within the project area. So
3 in terms of overall cultural resources, there's a lot of
4 diversity. It probably -- I would have to agree with
5 Bridget's testimony, it probably does constitute a
6 cultural landscape for which no studies have been done yet
7 in those terms.

8 It contains two prehistoric districts, multiple
9 stone scatters with human worked bones, tools, stone
10 tools, ceramics. And actually, one of the more important
11 things, of course, are the geoglyphs, are intaglios, the
12 prehistoric trail system, of which there are 11 segments,
13 and, of course, those sites with human broken fragments.
14 Very, very significant in terms of the overall cultural
15 resource picture.

16 So given that, the problems that I have or
17 concerns with the project -- and the analysis so far is
18 that it's been limited to archaeological resources. So
19 there's an inherent bias, which Bridget just covered, in
20 terms of those significant areas, sites, and so on that
21 may have also ascribed values of Native Americans or other
22 ethnic groups. So the inventory is actually inadequate at
23 this point.

24 The sites have not been evaluated for
25 eligibility. There's been a list of recommendations in

1 the cultural resources technical report, but there's no
2 real evaluation of why these properties are significant.
3 And prior to assessing the effects or determining whether
4 or not the project's going to adversely affect the
5 cultural resources or have a significant impact on them,
6 you first have to determine why, what character.

7 So my testimony went over the criteria, 1, 2, 3,
8 and 4, A, B, C, and D, for the National Register as to why
9 they're significant. And at that point one can then
10 determine whether or not they're going to be significantly
11 impacted. So at this point, that hasn't even been done
12 yet.

13 MS. MILES: I'm sorry. Were you still speaking?

14 MS. NISSLEY: I'm sorry, I was just going to add
15 one more thing, and that is, you know, there's been a lot
16 of talk and conversation and discussion so far about
17 mitigation options and mitigation plans. It's premature
18 to even think about developing mitigation at this point if
19 you don't know the reason or the characteristics, the
20 elements of why the particular identified sites are
21 significant.

22 MS. MILES: Thank you.

23 The staff determined that the project will
24 adversely impact cultural resources; however, at this time
25 neither staff nor BLM have made the determination as to

1 what resources are eligible for the National or California
2 Register. And is that, in your opinion, an appropriate
3 way for the staff to proceed?

4 MS. NISSLEY: No. I think they have to really
5 look at why these properties are significant. And again,
6 just going back to what I just said, is that in order to
7 determine adequate mitigation or develop mitigation plans,
8 you need to know why the properties are significant.

9 So let me just give you an example. So all of
10 the resources so far have been identified for their
11 archaeological value, with the exception of the Coyote
12 Mountain, which doesn't enter into this at this point.
13 But archaeological resources are eligible under Criterion
14 D or Criterion 4 under CEQA guidelines, which is for
15 information or data that they contain. And as Bridget
16 just testified, there may be additional values that are
17 added to those properties by those groups, tribes that
18 have other belief systems that are significant.

19 So it's not just a bunch of stone tools on the
20 desert floor that are significant. Those tools take on a
21 bigger, broader meaning in terms of ancestral ties to the
22 land and cultural landscape. So without that knowledge,
23 if you develop a mitigation plan that just goes in and
24 says, okay, we're going to remove the data for which the
25 site is important, in other words, that's going to be our

1 mitigation, and you remove the data, that doesn't begin to
2 address the other values that are ascribed to the site by
3 other properties, inherent properties and qualities to
4 that site.

5 MS. MILES: Thank you.

6 Based on your review of the technical reports and
7 your participation in the consultation meeting, are there
8 any traditional cultural properties that will be affected
9 by the project? And if you could also just explain what a
10 traditional and cultural property is.

11 MS. NISSLEY: Okay. A traditional cultural
12 property, it's a coin -- a phrase that was coined in 1990.
13 There's the National Register bulletin that addresses
14 this. It's a property that has been determined
15 significant, whether it's under CEQA or under National
16 Historic Preservation Act. So it's an eligible property,
17 eligible for listing on the California Register or the
18 National Register.

19 And so in addition to meeting the seven elements
20 of integrity, location, design, setting, workmanship,
21 feeling, association, and so on, it has to also meet one
22 of the criteria 1 through 4 and it has to meet two
23 additional criteria. And this is very significant in
24 defining a tradition cultural property, and that is that
25 it must be rooted in the history of the group that

1 ascribes value to it, and it also must be inherent in
2 allowing or enabling the group, the community, or the
3 tribe to continue their culture. So it has to be linked
4 and important to their cultural continuity. So that's the
5 definition.

6 What was the rest of your question?

7 MS. MILES: I was asking, based on your review of
8 technical reports and your participation in the
9 consultation process, if you have heard that traditional
10 cultural properties have been identified by the tribes.

11 MS. NISSLEY: Yeah, they've been identified by
12 the tribe. And certainly the tribes have spoken up in the
13 consultation meetings for the programmatic agreement.

14 There's been multiple tribal members at some of
15 these meetings who have said that the trail system's very
16 significant to them. Obviously the sites with cremation
17 or potential cremations, potential burials, very
18 significant. And it's really the overall network. In
19 other words, by isolating a site-by-site-by-site approach,
20 you sort of miss -- I guess I'm going back to what Bridget
21 said in terms of the puzzle -- you miss the bigger piece.

22 So, you know, one could say, for example, the
23 entire valley floor is a traditional cultural property, or
24 you could look at it more in terms of network, trails,
25 commerce, trade, transportation. So you could say that,

1 in fact, the trail system, even those, there's 11 remnants
2 of it left, so you don't have the entire system, it
3 conveys, in fact, traditional cultural use of this area by
4 those tribes.

5 MS. MILES: In your opinion did the energy
6 commission adequately analyze the significance of these
7 resources?

8 MS. NISSLEY: No, not at all. In fact, it's not
9 addressed at all.

10 MS. MILES: I mean, the staff assessment does
11 mention, I believe, Coyote Mountain, and certainly the
12 hearing officer pointed out previously to Ms. Nash that
13 there is some discussion in the staff assessment about
14 ethnographic resources. And so what do you mean when you
15 say that it really wasn't analyzed?

16 MS. NISSLEY: Well, just mentioning it in the
17 report -- and I did go to page 135, and I see and I've
18 read previously where it does say that in the staff
19 assessment. Typically though, there's been some kind of
20 interaction in terms of -- well, frankly, what normally
21 happens is there's an ethnographic study that's conducted
22 along with the archaeological study and other kinds of
23 studies in terms of cultural resources. So to date
24 there's been no comprehensive study done of traditional
25 cultural properties or the ethnography.

1 MS. MILES: And in a related topic, do you
2 believe that the project's area of analysis is
3 appropriately defined?

4 MS. NISSLEY: No, I don't. I think it's too
5 limited. I think it's -- it's what's called typically --
6 when I was -- I was the director of the advisory council's
7 western office, and for 12 years we reviewed everything
8 west of the Mississippi and east of Japan. And typically
9 there's a term that we used that's called "footprint
10 fetish," and that's how I would define this area of
11 potential effects that's been described as -- it's too
12 narrow. It takes into account the direct effect; it's not
13 broad enough to take into account indirect or cumulative
14 effects.

15 MS. MILES: Thank you.

16 And we heard from Mike McGuirt that the energy
17 commission did not do subsurface testing. Is it your
18 understanding that that was not done by BLM either?

19 MS. NISSLEY: That's my understanding, that
20 there's been no subsurface testing at all.

21 MS. MILES: And is that done in projects similar
22 to this in your experience?

23 MS. NISSLEY: Typically, once archaeological
24 resources have been identified -- it depends on the
25 contractor and the state, but typically once they're

1 identified, there's some form of minimal testing to
2 determine depth, to determine size. And it's not been
3 done to date on any of these resources.

4 MS. MILES: Do you think the energy commission
5 adequately analyzed the trails to determine their
6 significance?

7 MS. NISSLEY: Sorry, adequately analyzed -- I
8 couldn't --

9 MS. MILES: The trail network or the trail
10 segments that were identified to determine their
11 significance?

12 MS. NISSLEY: No, I don't. I think the
13 difficulty is that it's -- mostly what's happened in both
14 the cultural resources technical report and in the staff
15 assessment, they've put in tables that simply list site by
16 site by site by site. So there's no attempt overall to
17 try to pull together the picture of what human habitation
18 and use of this landscape has been, you know, over 10,000
19 years.

20 In terms of the specific resources that have been
21 recorded, I recognized in both reports there's sort of the
22 section called the overall cultural setting, historical
23 setting, ethnographic setting, but that's all pulled from
24 background literature and research. It's not been pulled
25 back into the significance in terms of the identified

1 resources. And the trails, the 11 segments are simply
2 mentioned. There's no attempt to try to describe or go
3 any further with what the really significance of the trail
4 system is.

5 MS. MILES: Could the commission have done any
6 specific types of study that are done for other projects?

7 MS. NISSLEY: Sure. They could have done a
8 cultural landscape study. Those are becoming fairly
9 common, there's guideline, National Park Service guidance
10 in terms of standards and protocol. They could have done
11 an ethnographic study; those are becoming fairly common.

12 So in other words, cultural resources isn't just
13 archeology, it's all kind of research. And it goes beyond
14 just the built environment and just the archeology, and it
15 also covers things like community and tribal use of the
16 area over time, which is what these other studies would
17 have described.

18 There's also another type of report that is
19 common, for example, in Alaska, because of the Native
20 Claims Settlement Act, and also in Hawaii because of state
21 law on native Hawaiian organizations, but it's called a
22 cultural impact assessment. And that's a much more
23 comprehensive overview. It goes way beyond archeology and
24 takes into account traditional practice and cultural
25 practice in the area. And that's something that actually

1 might have been well-suited for this kind of project.

2 MS. MILES: And in thinking about what is
3 reasonable to ask an applicant to do in this context for a
4 project of this size and magnitude of impacts to cultural
5 resources, I mean, do you have -- can you provide sort of
6 your sense of what would be required for due diligence
7 when it comes to these types of resources?

8 MS. NISSLEY: In terms of the legal requirements?
9 Due diligence under --

10 MS. MILES: Yeah, I mean just in terms of you
11 being familiar with projects similar, do you think that a
12 trail study or cultural landscape study would be required
13 for due diligence in a project like this? Or do you think
14 that that might be asking -- I mean, I'm just trying to
15 get a sense of what is reasonable in your experience to
16 expect for a project with impacts of this magnitude.

17 MS. NISSLEY: No. I think that that's part of my
18 concern, is the shortcoming on this project, is that an
19 adequate cultural resource assessment and inventory wasn't
20 done. When you're on federal lands and when you have the
21 kind of geological information, incredibly unique -- the
22 desert pavement is incredibly unique from a national
23 perspective. There is -- you know, once you get outside
24 the southwest, there's nothing much quite like this. And
25 the California desert is very unique in that regard, and

1 as a result, the archaeological resources and so on, the
2 desert pavement, trails across the desert pavement, the
3 amount of time it takes to develop those kinds of
4 resources.

5 An analogous situation would be in Hawaii where
6 you have trails that cross the lava. You know, when you
7 talk about feet wearing the soil and the lava and the
8 stones smooth over time because of the use, that's
9 significant, it's incredibly significant.

10 And so to just go in and look at the
11 archaeological resources is a rather narrow view. And,
12 frankly, most of the projects that I've either been asked
13 to review, comment on, or have been directly involved in
14 myself have gone way beyond this prior to approving the
15 project.

16 MS. MILES: Thank you.

17 Do you see any problems with the energy
18 commission allowing the project to mitigate it through a
19 programmatic agreement?

20 MS. NISSLEY: Yes, I do. And there's a couple
21 problems with this programmatic agreement. And the first
22 problem is -- well, where do I start? One is that
23 everything else is more or less deferred to some later
24 point in time. And what that does is that narrows down
25 the range of options. So once the project's approved,

1 there's little wiggle room in terms of what else can be
2 done by way of mitigation. You're already signing off on
3 a particular project in a particular area with an
4 estimated 30,000 SunCatchers and two phases and so on. So
5 you're constraining the options in terms of mitigation and
6 possibility.

7 The second thing is that the programmatic
8 agreement, they've chosen a section in the regulation,
9 800.14(b)(3), which is for programmatic agreements for
10 complex and multiple undertakings. The remainder of that
11 little section in 36 CFR part 800 regulations is that if
12 you're choosing that type of PA, it refers you back in
13 those regulations to 800.6, which is the section that
14 covers resolution of adverse effect in memorandum of
15 agreement.

16 And so from a regulation perspective in terms of
17 Section 106 of the National Historic Preservation Act,
18 that type of PA should get much more specific in terms of
19 the resolution. So there's an implicit assumption here
20 there's going to be an adverse effect. And the
21 programmatic agreement in this case should be very
22 specific in terms of what steps will be taken to resolve
23 the adverse effect. And so that means specificity. And
24 right now as the programmatic agreement stands, they have
25 put everything off until later so that, okay, we'll

1 consult at some later point this time with the Native
2 Americans on Phase 1 and its adverse effects and what are
3 we going to do about it.

4 And so I think that that -- and I think Bridget
5 said this in her testimony, it leaves them with not much
6 to say. You know, where can we go from here? I mean, if
7 they're going to put 18,000 SunCatchers in, well, how much
8 mitigation can be done? And it's way beyond data recovery
9 and archaeological site. It comes down to how do we
10 address the significant impacts in terms of the landscape?

11 And I was also the state -- governor-appointed
12 state preservation officer in Wyoming; and, you know,
13 during the last administration, huge oil and gas explosion
14 and EISs and inventories and so on. And we had lots of
15 trails; the Oregon Mormon Trail, the Bridger-Teton Trail,
16 the California Trail. And that was one of the -- what
17 happens is the cumulative effects and how do you assess
18 the cumulative effects and what type of mitigation, for
19 example, is possible if you have a sacred site or if you
20 have a trail, what's realistic in terms of mitigation?
21 What works, what doesn't? You know, and where does the
22 public come in?

23 Part of the problem with this PA is that, this is
24 also at 800.6, is that the public's supposed to be
25 involved. Well, how is the public going to become

1 involved in the consultation later on down the road with
2 this programmatic agreement? There's no -- there's no
3 stipulations, there's nothing stated within the
4 programmatic agreement that will cover that, you know, now
5 the public's weighing in on the draft and the final EIS,
6 but the public isn't a consulting party. And so there's
7 no mechanism for the public to review whatever mitigation
8 plans are drawn up. And that's, in my mind, a fatal flaw.

9 MS. MILES: And is there a requirement for the
10 BLM to consult and mitigate; I mean, do they have to
11 follow the mitigation that is developed through the
12 consultation process, or can consultation break down, and
13 then what would happen?

14 MS. NISSLEY: Yeah, there is no requirement --
15 and this isn't CEQA, this is Section 106, national
16 Historic Preservation Act, federal land, federal law.

17 The problem is that the federal agency's in the
18 driver's seat, always in the driver's seat. They are the
19 decision makers. They make all the decisions. So even
20 though consulting parties might say, we think it ought to
21 be this way, the federal agency can make the determination
22 that they're going to do something else.

23 The bigger problem is this agency has the right
24 to terminate consultation. And if they do that, and if
25 anybody's familiar with Cape Wind and what happened with

1 Secretary of the Interior Salazar, they issue their
2 comments, and the federal agency can take the comments --
3 they must take the comments into account. But then in
4 terms of ultimate decision making authority, in the end
5 they can do what they want.

6 So if consultation breaks down on this PA and the
7 federal agency terminates, then they have -- they are
8 totally within their legal rights to make whatever
9 decisions they want to make irrespective and irregardless
10 of whatever any consulting party's wishes, input,
11 comments, and so on might be.

12 MS. MILES: And what does this mean for the role
13 of the energy commission in trying to ensure that these
14 impacts are mitigated under CEQA?

15 MS. NISSLEY: I think that they need to address
16 some of these things before final approval. I think
17 that -- that there's not very much room in terms of
18 options for avoidance of sites, mitigation of sites. I
19 think they've actually painted themselves into a corner.

20 When you're talking about unique cultural
21 resources as in nationally significant -- the Anza trail,
22 for example, nationally significant corridor. Very, very
23 significant kind of the cultural resource. And yet,
24 there's -- there's -- it's not completely defined, there's
25 not -- they're still looking for information, there may or

1 may not be physical remains, there doesn't have to be
2 physical remains to give it consideration. I think that
3 there's a number of steps that should be taken into
4 consideration that prior to the approval of the project,
5 the PA is not necessarily going to be the be all and end
6 all in terms of responses or responsive to some of the
7 substantial impacts.

8 MS. MILES: Thank you, Ms. Nissley.

9 I have no further questions.

10 HEARING OFFICER RENAUD: Hold on, we may have
11 cross-examination for you.

12 MS. NISSLEY: Okay.

13 HEARING OFFICER RENAUD: Yes, go ahead,
14 Ms. Foley Gannon.

15 CROSS-EXAMINATION

16 MS. FOLEY GANNON: Ms. Nissley, a couple of
17 questions.

18 I understand you've laid out a number of
19 criticisms with this programmatic agreement and it sounds
20 like with the programmatic agreement process in general.
21 Do you think a PA can satisfy CEQA mitigation ever?

22 MS. NISSLEY: Yeah. I think if it's done
23 properly, yes; there are other types of programmatic
24 agreements where you don't defer everything. Where they
25 actually -- and frankly, you know, there is -- there would

1 have been enough time, there probably still is, even
2 though it's getting slim, in order to develop various
3 plans. It doesn't all have to be deferred.

4 In other words, one of the things that 36 CFR
5 part 800 does is you can phase portions of a project. So
6 under NEPA, of course, you can't segment a project, but
7 under Section 106, you may phase parts of the project. So
8 you can phase your determinations of eligibility, and you
9 can even phase your determinations of effect.

10 So there are meaningful ways to do it, it's just
11 for whatever reasons, they weren't selected on this
12 project.

13 MS. FOLEY GANNON: But isn't it true that a
14 programmatic agreement always involves some sort of -- the
15 reason you're doing a programmatic agreement is because
16 you can't actually do the standard MOA or MOU which sets
17 forth all of the ways that the mitigation can be carried
18 out.

19 MS. NISSLEY: No.

20 MS. FOLEY GANNON: Isn't that why programmatic
21 agreements were established under federal law?

22 MS. NISSLEY: No, that's not true. Programmatic
23 agreements were originally developed, the regs previous to
24 this 2004 CFR part 800, they were designed for program as
25 opposed to project. And so the, really, use of them is if

1 a federal agency has a program of action.

2 So in theory they -- the BLM could have written a
3 programmatic agreement for all the solar projects that are
4 going to go on their land. So they're sort of incorrectly
5 using the whole concept of a programmatic agreement. And
6 one of the subsets of when to use a programmatic agreement
7 is where other circumstances warrant this 800.14(b), where
8 other circumstances warrant a departure from your normal
9 800.4 through 800.6.

10 MS. FOLEY GANNON: But I still -- I guess I don't
11 understand the answer completely.

12 A programmatic agreement is for in a situation
13 where the standard procedures are not applying; is that
14 correct, for some reason or another?

15 MS. NISSLEY: That can be one reason why --

16 MS. FOLEY GANNON: Okay. So in that circumstance
17 then, isn't it almost by necessity that it's not going to
18 have the level of specificity that you would have under
19 the standard procedures; is that correct? There's going
20 to be some --

21 MS. NISSLEY: The project?

22 MS. FOLEY GANNON: -- deviation, right?

23 MS. NISSLEY: Pardon me?

24 MS. FOLEY GANNON: There's going to be some
25 deviation from the standard procedures; isn't that

1 correct?

2 MS. NISSLEY: Yes.

3 MS. FOLEY GANNON: And that deviation is going to
4 be involving some lack of specificity that you would find
5 in the standard procedures; isn't that correct?

6 MS. NISSLEY: Perhaps.

7 MS. FOLEY GANNON: But you do still believe that
8 a programmatic agreement can comply with CEQA; is that
9 correct?

10 MS. NISSLEY: If it's done well, yes.

11 MS. FOLEY GANNON: Okay. And you referenced a
12 problem with the PA as it's proposed that I think you said
13 that there wouldn't be enough public involvement because
14 the public wasn't a party under this PA?

15 MS. NISSLEY: No. What I said is if you go to
16 800.14(b)(3), it states that that kind of programmatic
17 agreement for complex and multiple undertakings, you have
18 to follow the procedure at 800.6. It refers you back to
19 the previous section in the regulation. And under that
20 section, one of the criteria is you have to inform and
21 include the public.

22 MS. FOLEY GANNON: Right. So how would that --
23 again, you said that there's a problem because the public
24 is not a party. Have you ever seen a PA where the public
25 is a party?

1 MS. NISSLEY: What I said is they're not a
2 consulting party.

3 MS. FOLEY GANNON: Right. So have you ever seen
4 a PA where they're a consulting party?

5 MS. NISSLEY: No. By definition those are two
6 separate entities.

7 MS. FOLEY GANNON: So could they ever satisfy
8 this requirement?

9 MS. NISSLEY: Yeah.

10 MS. FOLEY GANNON: How could you do that?

11 MS. NISSLEY: By -- you really don't want me to
12 tell you this, do you? I mean, I think it's fairly
13 obvious.

14 Most federal agencies have a public notification
15 process wherein the public is notified that here's what's
16 being proposed, and they have an opportunity to comment
17 and weigh in. But without it being specifically written
18 into a programmatic agreement, it's most likely not going
19 to happen.

20 MS. FOLEY GANNON: Are you suggesting that the
21 programmatic agreement should include public notifications
22 of every decision that's being made pursuant to it?

23 MS. NISSLEY: When it comes to mitigation, yeah,
24 I do.

25 MS. FOLEY GANNON: Have you ever seen a public PA

1 that does that?

2 MS. NISSLEY: Yes.

3 MS. FOLEY GANNON: Can you refer to what PA you'd
4 be speaking?

5 MS. NISSLEY: Oh, not off the top -- you have to
6 remember I've probably read, looked at, and written
7 probably well over a thousand programmatic agreements; so
8 no, off the top of my head, I can't pull one out.

9 MS. FOLEY GANNON: All right. That just sounds
10 like an unusual -- I haven't seen that before, so it
11 seemed like an unusual provision to have public
12 notifications of every determination that was being made
13 subsequent to the execution of the PA.

14 MS. NISSLEY: Well, let me explain it.

15 So if you are -- cultural resources are
16 non-renewable. So if you're making this go away, through
17 excavation or compromising their integrity, the public has
18 a right to know. At this point in the process, there
19 seems to be a lot of question marks about final design and
20 so on, and so, therefore, the public isn't fully informed
21 of all the significant impacts. So you could write into
22 your programmatic agreement stipulations where when a
23 mitigation plan is -- a specific mitigation plan is
24 developed, the public has the right to review it and
25 comment on it or participate in altering it.

1 MS. FOLEY GANNON: Have you ever seen a
2 programmatic agreement or conditions which require --
3 which include performance standards rather than the
4 specific measures that would be carried out with regard to
5 each cultural resource which is potentially eligible?

6 MS. NISSLEY: Okay. So, I'm sorry, could you
7 repeat that?

8 MS. FOLEY GANNON: So if, let's say, a condition
9 of certification or an approval by some agency or
10 programmatic agreement includes performance standards
11 which will be used to establish the mitigation; is that an
12 acceptable approach in your view?

13 MS. NISSLEY: If the performance standards were
14 comprehensive and equal to what's being -- to whatever is
15 being adversely affected, yes.

16 MS. FOLEY GANNON: And turning that to -- you
17 said -- and, again, let me try to see if I can paraphrase
18 you here, you were talking about a problem with this
19 programmatic agreement is that the federal agency is
20 really the one who makes the decisions ultimately, even
21 though they sign this agreement and they said they're
22 going to consult, they ultimately make the decision.

23 Is that a correct paraphrase of your concern that
24 you raised?

25 MS. NISSLEY: Yes.

1 MS. FOLEY GANNON: Is it true that the BLM as
2 landowner also is ultimately making the decisions about
3 what happens on their land --

4 MS. NISSLEY: Correct.

5 MS. FOLEY GANNON: -- on a PA?

6 MS. NISSLEY: Say again? Pardon me?

7 MS. FOLEY GANNON: With or without a programmatic
8 agreement?

9 MS. NISSLEY: In terms of cultural resources,
10 yes.

11 MS. FOLEY GANNON: So as the federal government
12 owning land, they would be the ones who make this
13 decision, whether or not there's a programmatic agreement.

14 MS. NISSLEY: Correct.

15 MS. FOLEY GANNON: So would you say it's feasible
16 for the energy commission or any other state entity to
17 dictate to the BLM what they need to do on their land?

18 MS. NISSLEY: Doesn't that get into state
19 sovereignty issues? I don't know. I don't know.

20 MS. FOLEY GANNON: I guess what I'm trying to get
21 at is under CEQA, as I'm sure you're aware, there's a
22 feasibility requirement regarding mitigation measures that
23 are going to be imposed. So if you're saying that the
24 federal government under 106 in a PA or the federal
25 government as an owner of land -- I'm trying to just

1 figure out is it feasible for the CEC to require
2 mitigation measures that the federal government would,
3 therefore, have to comply with.

4 MS. NISSLEY: Well, but my question is did --
5 back to you would be, is it the federal government or is
6 it the applicant that would have to comply with it?

7 MS. FOLEY GANNON: Does mitigation measures
8 usually involve things that are going to be on the federal
9 lands?

10 MS. NISSLEY: Typically if the project's on
11 federal land, yes.

12 MS. FOLEY GANNON: Okay. Thank you.

13 No further questions.

14 HEARING OFFICER RENAUD: Okay.

15 Staff, questions?

16 MR. BABULA: Yes. Thanks.

17 CROSS-EXAMINATION

18 MR. BABULA: Does the Section 106 allow for the
19 eligibility determinations post certification?

20 MS. NISSLEY: Does the Section 106 process allow
21 for determination -- well, there's nothing in the
22 regulations that state it quite that way. In other words,
23 the vehicle that they're using, the programmatic agreement
24 that they have -- this avenue that's been chosen requires
25 that you assess the adverse effects. And the way you

1 assess the adverse effects to a property that's been
2 determined eligible is are the characteristic that qualify
3 that property for eligibility, are they being affected to
4 the degree that the property will lose essentially what
5 makes it significant.

6 So inherent in the process is you must first
7 determine why that property is eligible in order to assess
8 whether or not you're going to have a significant impact.

9 So let me just give you an example. Say there's
10 a building and it's eligible only for its design. That
11 building can be dismantled and moved three blocks down the
12 street and rebuilt and it's still eligible. If the
13 building, the design's not so significant; but the
14 location is significant, like say a courthouse, because of
15 its significance in terms of location, you can't move it.

16 So it's the same kind of thing for all these
17 sites out there in Imperial Valley. One has to know why
18 they're significant under Criteria 1, 2, 3, or 4 in terms
19 of CEQA guidelines. And so not to do that, you've skipped
20 a major part of the process and you've rendered your
21 decision useless at the end because there's nothing to
22 base it on, there's no defensible position to say, yes,
23 we're significantly impacting these properties or, no,
24 we're not, because you haven't made the determination of
25 eligibility yet.

1 MR. BABULA: Okay. But if you have a menu list
2 of mitigation that you can pull from, then wouldn't
3 determination of whether it's listable or how you want to
4 mitigate the impacts, a refinement can be done later, you
5 know what the mitigation can be, you've got your menu, and
6 then it's a matter of clarifying, assessing some of the
7 impacts that --

8 MS. NISSLEY: Well --

9 MR. BABULA: Go ahead.

10 MS. NISSLEY: -- not really. Because let's just
11 say -- let's take an archaeological site or district.
12 Very easy if those sites are eligible only under
13 Criterion 4, which is data that they contain. You can go
14 in and do data recovery, you can conduct excavation or map
15 the surface artifacts, boom, you're done, you've done your
16 mitigation.

17 But let's say that we're consulting with tribes,
18 and the tribe says, oh, but that area is, you know, the
19 Bear Clan's area and they practice their ceremonies and
20 have done for hundreds of years. Now what's your standard
21 list of mitigation going to say? Is there anything that's
22 already -- that you could have conceivably put into that
23 mitigation list that would be comprehensive enough to
24 pertain to that kind of situation? That's why the
25 consultation with Native Americans is so important and it

1 should come very early in the process.

2 MR. BABULA: Okay. Let's see. The last
3 question, you seem to have -- I believe you testified that
4 there was not enough assessment of ethnographic resources.
5 There's -- we have a 500-page staff assessment, we have
6 requirements in the PA for historic properties management
7 plans, historic property treatment plans, NAGPRA plan of
8 action, monitor and discovery plan. Why isn't that
9 enough? Or does that not cover the specific issue that
10 you have?

11 MS. NISSLEY: It doesn't cover the specific
12 issues of ethno-historic or ethnographic use of the area.
13 So typically an ethnographic study is composed of several
14 elements. One would be research, which some of that has
15 already been done; but typically it will consist of oral
16 interviews, in other words, trying to hone more -- why
17 this area's more important than a different area, what is
18 it in terms of the practice of traditional cultural that
19 conveys significance to this area? And that's not been
20 done. And it doesn't matter whether there's 1100 pages in
21 a technical report or 500 in the staff assessment, if it
22 hasn't really been covered with respect to due diligence,
23 then it's not there, it's not existent.

24 MR. BABULA: Okay. Last question.

25 I believe you brought up a concern that there's a

1 potential that the PA process could get terminated or that
2 it wouldn't go into effect. Are you aware that our
3 condition of certification CUL 1 accounts for that and
4 states that if for any reason any party of the
5 programmatic agreement were to terminate that document and
6 it were to have no further force or effect for the purpose
7 of compliance with Section 106, the applicant could
8 continue to be bound to the terms of that original
9 agreement for purposes of compliance with CEQA? Does that
10 arrest any fears you had regarding the potential that this
11 project could be under no obligation to do any mitigation?

12 MS. NISSLEY: No, because that last part you
13 said, they'd be under -- you're assuming that -- so right
14 now -- so when they terminate, there's no final signed
15 agreement document. So you have a draft document, it's
16 not legally binding, nobody has signed it, the federal
17 agenda terminates, and you're saying that the commission
18 would require that the applicant adhere to the draft --
19 the terms of the draft programmatic agreement? Is that
20 what that sentence is saying?

21 MR. BABULA: Can you repeat that again? Just the
22 last -- the question.

23 MS. NISSLEY: It's not clear to me. It sounds to
24 me like there is -- okay, so there's this draft
25 programmatic agreement out there that's not final. And

1 let's say consultation is terminated. And if I'm
2 understanding that section you just read, you're saying
3 that the applicant for the project would still be held to
4 the terms of the draft programmatic agreement regardless
5 of the termination?

6 MR. BABULA: Well, it doesn't specify the -- what
7 level the programmatic agreement is at. I think it
8 assumes there is a programmatic agreement, a final one,
9 that then later gets terminated.

10 MS. NISSLEY: Oh, that's a different situation.
11 You can have a fully-executed agreement,
12 programmatic agreement in place, and two years from now it
13 may be terminated; but they can't -- but no party can
14 terminate unless they actually meet and discuss why they
15 want to terminate. That's an entirely different
16 situation.

17 What I'm talking about is prior to the
18 programmatic agreement being fully executed. In other
19 words, let's say next week everything just blows up and
20 nobody can agree and, therefore, that draft programmatic
21 agreement does not get signed. The federal agency then
22 terminates the whole Section 106 process, and in
23 accordance with 800.70 of the regs, they would then seek
24 advice of counsel and historic preservation comment.
25 That's another way to conclude that Section 106 process.

1 But then the advisory council would issue their comments,
2 but the federal agency isn't bound to those comments in
3 any way; they must consider them, but that's it.

4 MR. BABULA: Okay.

5 COMMISSIONER EGGERT: This is
6 Commissioner Eggert. I don't know, somebody's got some
7 background talking. I don't know if there's a way to mute
8 them. It's somewhat distracting. Might be somebody on
9 the WebEx.

10 HEARING OFFICER RENAUD: Okay. I'm looking --
11 which one are you, Commissioner? I don't want to mute
12 you.

13 COMMISSIONER EGGERT: I don't think I'm listed, I
14 don't think I'm named on the listing, so I don't know
15 which --

16 HEARING OFFICER RENAUD: Gotcha. Well, we'll
17 watch. We'll see if this comes up, I'll see if I can mute
18 them. Thank you.

19 COMMISSIONER EGGERT: Thank you.

20 HEARING OFFICER RENAUD: Okay. Carry on.

21 MR. BABULA: Okay. Last question.

22 Isn't it true that one purpose of a PA under
23 800.14(b) is to deal with situations where project effects
24 are not fully known in advance?

25 MS. NISSLEY: Not what is currently -- what

1 they're currently doing. Because they've got -- what the
2 group, the task force that decided how they're going to
3 get through this process, what they took out of the 800
4 regs, this 800.14(b)(3). And what you're referring to is
5 800.(b)(1)(ii).

6 MR. BABULA: Correct.

7 MS. NISSLEY: When the effects on a historic
8 property cannot be fully determined prior to approval.
9 Different situation. Different part of the reg. That
10 section does not refer you back to 800.60 as the vehicle
11 they've currently chosen does.

12 MR. BABULA: Okay. So what I'm looking at says
13 "Use of Programmatic Agreements," and then it says, "A
14 programmatic agreement may be used," and then you go to
15 the little two I, "when effects on historic properties
16 cannot be fully determined prior to approval of a
17 undertaking."

18 MS. NISSLEY: Right, but that's not what they're
19 doing. You have to keep going. And they've gone over to
20 number 3. You're under number 1. And then you go over to
21 number 3, and it says, "Programmatic agreements for
22 complex for multiple undertaking." And then it says,
23 "Consultation develop a programmatic agreement for dealing
24 with the potential adverse effects of complex projects or
25 multiple undertakings shall follow 800.6." And then you

1 go back to 800.6, and it says, "Resolution of adverse
2 effects."

3 MR. BABULA: Okay. Thank you.

4 No further questions.

5 HEARING OFFICER RENAUD: Any cross-examination by
6 Mr. Budlong?

7 MR. BUDLONG: No.

8 HEARING OFFICER RENAUD: All right.

9 Any other parties?

10 Applicant?

11 Yes, go ahead.

12 CROSS-EXAMINATION

13 MS. FOLEY GANNON: I have a couple follow-up
14 questions, Ms. Nissley.

15 Are you aware that the BLM takes the position
16 that it cannot issue its record of decision until it has a
17 signed PA?

18 MS. NISSLEY: Yes.

19 MS. FOLEY GANNON: And are you also aware while
20 if they did not sign the PA under 106 that you described,
21 they would have to go to the advisory council who would
22 issue an opinion, legally they may not be bound by that,
23 but would they be in violation with 106 if they did not
24 comply with the terms or the suggestions?

25 MS. NISSLEY: No.

1 MS. FOLEY GANNON: My understanding is it's akin
2 to -- maybe you're not aware of it, but the U.S. Fish &
3 Wildlife Service issues biological opinions which are not
4 binding upon an agency, but failure to comply with the
5 terms of it makes them possibly open to claims that
6 they're violating the law. Is that not a similar case
7 here?

8 MS. NISSLEY: No, it's not similar.

9 MS. FOLEY GANNON: So the agency can just ignore
10 it and there would be no ramifications.

11 MS. NISSLEY: Right. Well, they can't ignore it.
12 What they have -- the whole process in the regs where they
13 would terminate the consultation and request the advisory
14 council's comment. That comment then must be considered
15 by the agency prior to making their final decision. And
16 when they make their final decision, they have to provide
17 the rationale in writing and make it public as to why they
18 either did or did not do anything the advisory council
19 suggested or --

20 MS. FOLEY GANNON: Would it address your concerns
21 if the commission inserted into this condition that the
22 condition requires that there be a signed draft, a signed
23 PA?

24 MS. NISSLEY: No, because I don't think you can
25 hold a federal agency to that.

1 MS. FOLEY GANNON: Well, no, the applicant
2 couldn't proceed under the condition of certification then
3 unless the federal agency signed the PA. That's how it
4 would be -- of course they can't impose conditions on
5 federal agencies as we discussed earlier.

6 MS. NISSLEY: Right.

7 MS. FOLEY GANNON: So would that address your
8 concern? Because obviously the project then could not go
9 forward if there was not a signed PA.

10 MS. NISSLEY: Well, it's not just a question of a
11 signed PA, there's inherent problems in the PA with the
12 way it's crafted.

13 I think the PA needs to be written and consulted
14 on and made into a better product that's more fitting in
15 terms of what's appropriate for the types of impacts that
16 are happening to the property.

17 MS. FOLEY GANNON: No further questions.

18 Thank you.

19 MS. MILES: I have a redirect. I'm not sure if
20 that's appropriate now or other parties have questions.

21 HEARING OFFICER RENAUD: Any other parties have
22 cross-examination?

23 I have some questions, but I think I'll wait till
24 everybody's done.

25 MS. MILES: This one is pertaining directly to

1 the discussion we just had.

2 HEARING OFFICER RENAUD: Thank you.

3 REDIRECT EXAMINATION

4 MS. MILES: Just a question about the PA.

5 Is it true that the mitigation is in the PA, or
6 is it that there are directions to develop mitigation
7 through future plans?

8 MS. NISSLEY: That's one of the primary problems
9 with what I just said, what I think the -- the answer is
10 no, there aren't any mitigation developments in the text
11 of the PA, they're all -- they're simply stipulations that
12 say the mitigation plans will be developed at some point
13 in the future.

14 MS. MILES: So if you have a signed PA, that is
15 not sufficient to hold the applicant to specific
16 provisions of mitigation because the mitigation plan
17 hasn't been completed; is that correct?

18 MS. NISSLEY: That is correct.

19 MS. MILES: Okay. Thank you.

20 HEARING OFFICER RENAUD: All right.

21 Any other questions?

22 Okay. Yes, Ms. Foley Gannon, go ahead.

23 MS. FOLEY GANNON: One further question.

24 RECROSS-EXAMINATION

25 MS. FOLEY GANNON: In the PA there's timing about

1 when those mitigation plans have to be prepared; is that
2 correct?

3 MS. NISSLEY: Yes.

4 MS. FOLEY GANNON: Ms. Nissley?

5 MS. NISSLEY: Oh, yeah, I said yes. I'm sorry.
6 Yes.

7 MS. FOLEY GANNON: And what are the triggers for
8 when those plans need to be done?

9 MS. NISSLEY: Off the top of my head, I cannot
10 remember. I'm sorry.

11 MS. FOLEY GANNON: Many of them are prior to
12 ground breaking; is that not correct?

13 MS. NISSLEY: Again, I can't remember. I'm going
14 to say yes, you're probably correct.

15 MS. FOLEY GANNON: So would having a signed and
16 enforceable programmatic agreement which has developed
17 mitigation plans prior to ground breaking, particularly
18 ground breaking in any area where there could be an effect
19 aleve your concerns?

20 MS. NISSLEY: No.

21 MS. FOLEY GANNON: Okay.

22 MS. NISSLEY: The primary point here is that
23 there -- that's fine for some of the archaeological sites,
24 it's when you get into properties that are eligible under
25 Criterion 1, 2, or 3 or A, B, or C, that's much more

1 difficult. And once the project is approved, you've
2 basically got yourself into a box that's limiting in terms
3 of the type of mitigation options that you can implement,
4 because the project's going forward, and it's highly
5 unlikely that Phase 1 and Phase 2 are going to be
6 completely redesigned to avoid or, you know, put in a
7 quarter-of-a-mile buffer zone between a historic trail
8 segment and, you know, 10,000 SunCatchers. It's just not
9 going to happen. The time for that kind of consideration
10 is now, prior to project approval.

11 MS. FOLEY GANNON: No further questions.

12 HEARING OFFICER RENAUD: Okay. This is
13 Raoul Renaud, I'm the hearing officer, and I'm considered
14 part of the committee. And I have a couple of questions.

15 I've just been tracking all of these references
16 to the 800(b), et cetera, 800-point things.

17 So first of all, let me ask you, you've expressed
18 concern about ethnographic resources. Is an ethnographic
19 resource covered within the definition of a historic
20 property?

21 MS. NISSLEY: Yes.

22 HEARING OFFICER RENAUD: All right. Now, when
23 you were answering about the 800.14 areas, okay, you
24 wanted us to look at -- let's see, it was way down here --
25 the paren three small paren, "Developing Programmatic

1 Agreements for Complex or Multiple Undertakings."

2 MS. NISSLEY: Right.

3 HEARING OFFICER RENAUD: Right? Okay.

4 And I didn't understand why you aren't instead
5 referring us to (b)(1)(ii).

6 MS. NISSLEY: Well, that would be fine, but in
7 this case the task force that -- I guess the staff person,
8 Mike McGuirt, and BLM and some other people a year ago or
9 something decided that they would pursue this other avenue
10 of this other type of programmatic agreement.

11 HEARING OFFICER RENAUD: Is that written
12 somewhere?

13 MS. NISSLEY: It's written in all the notes and
14 the assessment in terms of -- actually, it was probably in
15 something the BLM wrote as well.

16 HEARING OFFICER RENAUD: Well --

17 MS. NISSLEY: -- as to how they started down the
18 road of consultation for programmatic agreement.

19 There was a task force that met last year, and it
20 was a small number of people. And I don't have the list
21 in front of me, but I'm sure it's available, as to who
22 attended that meeting. And they discussed and figured out
23 this was going to be the path they were going to take.

24 HEARING OFFICER RENAUD: Well, hasn't the BLM
25 determined that the effects on historic properties in this

1 case cannot be fully determined prior to approval of the
2 undertaking?

3 MS. NISSLEY: I would say yes.

4 HEARING OFFICER RENAUD: Okay. Because that's
5 what it says in the draft PA.

6 MS. MILES: Can I just clarify?

7 Actually, if you look at the PA itself --

8 HEARING OFFICER RENAUD: I'm getting there.
9 Okay?

10 MS. MILES: Oh, I'm just pointing out where it
11 says 800.14(b)(3).

12 HEARING OFFICER RENAUD: I'll get there.

13 MS. MILES: Okay. Great.

14 HEARING OFFICER RENAUD: All right.

15 I can't remember, were you in the middle of an
16 answer?

17 MS. NISSLEY: I don't think so.

18 HEARING OFFICER RENAUD: All right. Oh, I know,
19 the question. Here's the question: Hasn't the BLM
20 determined that the effects on historic properties in this
21 case cannot be fully determined prior to approval of the
22 undertaking?

23 MS. NISSLEY: I don't know if they've actually
24 said that.

25 HEARING OFFICER RENAUD: I'm sure you're familiar

1 with the draft PA.

2 MS. NISSLEY: Correct.

3 HEARING OFFICER RENAUD: All right. If you look
4 at page 6 of that document, the -- let's see -- the third
5 "whereas," do you have that in front of you?

6 MS. NISSLEY: I don't have it in front of me, no.

7 HEARING OFFICER RENAUD: Well, okay. I'll read
8 it to you. "Whereas the BLM and COE," which means the
9 Army Corps, "in consultation with the SHPO and the ACHP
10 and pursuant to 800.4(b)(2) has determined that a phased
11 tiered process for compliance with Section 106 may be
12 appropriate for the undertaking."

13 So they've made that determination, correct?

14 MS. NISSLEY: Correct.

15 HEARING OFFICER RENAUD: Okay.

16 MS. NISSLEY: Well, phased and tiered are
17 slightly different terms. I mean tiered goes back to
18 NEPA. There is no such thing as tiering in the National
19 Historic Preservation Act. But I did mention earlier that
20 it's possible to phase your determinations of eligibility
21 and your determinations of effects.

22 HEARING OFFICER RENAUD: Okay. And so that
23 refers us -- first of all, I should say the word "tiered"
24 is in parentheses as if -- it's in case you didn't know
25 what "phased" means. But we'll go with "phased" because

1 that's what they use in this law.

2 Then if you go to 800.4(b)(2), which is what they
3 refer to in that paragraph, let me switch back to that --

4 MS. NISSLEY: Phased identification and
5 evaluation.

6 HEARING OFFICER RENAUD: Yes. Okay. And it
7 says, "The agency official may use the phased process to
8 conduct identification and evaluation efforts and may
9 defer final identification and evaluation of historic
10 properties if it is specifically provided for in an MOA, a
11 programmatic agreement pursuant to 800.14(b) or other
12 documents pursuant to 800.8."

13 Now, isn't that what's being done here? It's an
14 MOA, I mean a programmatic agreement.

15 MS. NISSLEY: Right. For National Historic
16 Preservation Act and these regulations, that's acceptable.
17 Under CEQA, it's not acceptable. That's the problem.
18 There's the disconnect between what's required under CEQA
19 and then what is required under NHPA.

20 HEARING OFFICER RENAUD: Well, I suppose --

21 MS. NISSLEY: For CEQA you need to recognize
22 whether or not you have historical resources and then
23 whether or not there's going to be a significant impact on
24 each of them.

25 HEARING OFFICER RENAUD: I think we know that

1 around here.

2 MS. NISSLEY: I know, but I think that's the
3 main --

4 HEARING OFFICER RENAUD: I guess that's -- I
5 guess you could get into a legal argument about all that,
6 but I just wanted to make sure I was following your trail
7 of references through these 800-point whatever's.

8 MS. NISSLEY: Right. Okay. Sorry.

9 HEARING OFFICER RENAUD: And you've helped me
10 with that.

11 Have you been to the site?

12 MS. NISSLEY: No. I mean, not on any of the
13 group outings or anything. I've worked in that area
14 before.

15 HEARING OFFICER RENAUD: Have you been to the
16 site with the purpose of looking at it with respect to
17 this proposed project?

18 MS. NISSLEY: No, I have not.

19 HEARING OFFICER RENAUD: All right. In the staff
20 analysis the site has been described as highly disturbed
21 due to years of heavy and ongoing OHV. That means
22 off-highway vehicle use.

23 Have you come across that description?

24 MS. NISSLEY: Yes, I have.

25 HEARING OFFICER RENAUD: And does that -- is

1 knowing that the site has been used in that fashion alter
2 any of your opinions about the resources?

3 MS. NISSLEY: Well, my -- I did see that, and
4 it's noted, but my opinion's based on the technical report
5 in the recording of the -- in other words, the people that
6 went out, the professional archeologists that went out and
7 recorded the site. And they've got evaluation of the
8 condition of the site. And for many of the sites, the
9 condition is quite good. In other words, they're not
10 compromised.

11 The sites that have been -- so there's 100
12 percent inventory, ground -- on-the-ground inventory that
13 was conducted by URS and described in the technical
14 report. And in those reports, typically sites that are --
15 don't have integrity, in other words, they've had lots and
16 lots and lots of OHV traffic, so much so that they've been
17 destroyed, those properties would not be eligible and
18 would not be given consideration under CEQA or NHPA.

19 HEARING OFFICER RENAUD: All right. Thank you.

20 Just jumping back to those 800-point sections, is
21 this a complex undertaking?

22 MS. NISSLEY: I don't think so.

23 HEARING OFFICER RENAUD: Why not?

24 MS. NISSLEY: Because it's divided into Phase 1
25 and Phase 2. My experience, and, again, this comes from

1 being a former SHPO and at the advisory council and having
2 looked at thousands of projects, this is pretty
3 straightforward. It's a pretty well-contained,
4 well-defined project.

5 HEARING OFFICER RENAUD: All right. You
6 referenced earlier the APE.

7 MS. NISSLEY: Yes.

8 HEARING OFFICER RENAUD: In the draft PA is the
9 APE defined as considerably larger than the project
10 footprint?

11 MS. NISSLEY: No. In fact, it pretty much just
12 repeats what was said in the report.

13 HEARING OFFICER RENAUD: Well, I can't remember,
14 is it -- do you have that in front of you --

15 MS. NISSLEY: I don't, no.

16 HEARING OFFICER RENAUD: -- the draft PA?
17 All right. In defining the APE. I'm just trying
18 to get a bit of it to read to you.

19 Okay. Well, specific areas of concern are
20 cultural resources, include cultural resources in the Yuha
21 area of critical environmental concern. And this is the
22 one that looks to me like it ready broadens it. "Any
23 cultural resource or location which has been included in
24 the Native American Heritage Commission's sacred lands
25 files identified through a literature review or records

1 search or identified by an Indian tribe, tribal
2 organization, or individual through consultation as having
3 religious or having cultural significance."

4 Doesn't that part I just read really broaden this
5 out to being almost anything that someone has made an
6 argument and presented some evidence that it should be
7 included, that it would then be included?

8 MS. NISSLEY: No. And a part of that answer is
9 culturally related. And that is that -- so the sacred
10 lands file that the Heritage Commission of California has
11 is pretty limited.

12 HEARING OFFICER RENAUD: Okay.

13 MS. NISSLEY: There's a reluctance for many, many
14 tribes, and this is nationally, to talk about areas that
15 are sacred, because once you talk about them, they're no
16 longer protected. And in some cases there's cultural
17 traditions that you cannot talk about them. You're not
18 allowed to talk about them. So it's highly unlikely that
19 you're going to find the information in a file, in a box
20 in Sacramento --

21 HEARING OFFICER RENAUD: But suppose a tribe came
22 in or an individual came in and identified a resource as
23 having religious or cultural significance? That's
24 provided for here. Wouldn't that get around the problem
25 you're voicing?

1 MS. NISSLEY: Well, yeah, and that kind of goes
2 back to Bridget's testimony. Had the consultation with
3 tribes been ongoing for over a year, you'd probably have a
4 much better idea. But they didn't get the technical
5 report till July; what, just a month ago?

6 HEARING OFFICER RENAUD: Well, this is pursuant
7 to the PA so -- which isn't really done.

8 MS. NISSLEY: That's my point.

9 HEARING OFFICER RENAUD: So under the PA, people
10 have had the opportunity to come in and identify, correct?

11 MS. NISSLEY: Right, but -- but at -- okay, I had
12 a tribal member say to me that what were they supposed to
13 comment on. This was on a different project that was
14 approved. And they had the same -- analogous situation
15 where they're supposed to consult with tribes after the
16 project is approved. And the tribe was complaining and
17 going on and on to me about the fact that there was
18 nothing for them to comment on.

19 What are you going to say?

20 HEARING OFFICER RENAUD: Well, they could
21 identify areas.

22 MS. NISSLEY: Toward what end? Will the
23 project --

24 HEARING OFFICER RENAUD: Toward defining the APE.
25 That's really what this is about.

1 MS. NISSLEY: Say again.

2 HEARING OFFICER RENAUD: To what end; my answer
3 to you is toward defining the APE. That's what this is
4 about, that's what we're reading from here, what's the
5 APE.

6 MS. NISSLEY: Okay. And so if you've not yet --
7 so one of the first things you do when you have a project
8 is define the APE, because that's how you identify what
9 cultural resources are likely to be, directly affected,
10 indirectly affected, cumulatively affected and so on.

11 And so they didn't really consult with tribes in
12 defining the APE, the area of potential effects. And so
13 it hasn't been until recently in the consultation meetings
14 for the PA where tribes have begun to speak up about trail
15 networks and so on and the viewshed from Coyote Mountain
16 and so on. So that hasn't really been taken into account.

17 HEARING OFFICER RENAUD: Thank you.

18 Ms. Miles, you started to interject something
19 there, and I'm -- is it still relevant?

20 MS. MILES: Yes. I'm sorry, if that was an
21 interruption.

22 HEARING OFFICER RENAUD: Go ahead.

23 REDIRECT EXAMINATION

24 MS. MILES: I just wanted to point out, I'm not
25 sure if this clarifies anything, but this the programmatic

1 agreement, you probably already saw this. In the
2 "whereas" clause above the one that you were pointing out,
3 it does say that the BLM and Corps of Engineers have
4 consulted with the California SHPO and the advisory
5 council pursuant to 36 CFR 800.14(b)(3).

6 HEARING OFFICER RENAUD: Uh-huh.

7 MS. MILES: And following the procedures outlined
8 at 36 CFR 800.6.

9 So it does also mention the next 800 section in
10 the next whereas clause; so both are mentioned here.

11 HEARING OFFICER RENAUD: Okay. So we've got
12 both.

13 MS. MILES: Just to clarify.

14 And is that possible, Ms. Nissley, to proceed
15 under both provisions?

16 MS. NISSLEY: Yeah.

17 MS. MILES: Okay. And just one follow-up
18 question with the discussion that just occurred.

19 Is there a problem that arises when you define
20 the APE after project approval?

21 MS. NISSLEY: Yeah. That's why the APE is one of
22 the first steps prior to going out and doing your
23 identification efforts for cultural resources. You
24 precluded -- if you don't properly define the APE, you've
25 precluded inclusion of properties, cultural properties,

1 that will be affected by the project. So if you've drawn
2 it too small you're not taking into account the effects of
3 the project on properties that might be farther off in the
4 distance, which is a requirement, and cumulative and
5 indirect.

6 MS. MILES: So are you suggesting that they
7 should have been surveying and analyzing all of the
8 cultural resources within the APE that could be affected
9 by the project prior to project approval?

10 MS. NISSLEY: Well, if they can't inventory all
11 the property, they should have drawn up a sample that
12 included not just archaeological sites but other types of
13 sites in a larger APE so you've accounted for indirect
14 effects and cumulative and farther removed in the
15 distance.

16 MS. MILES: And in your opinion is the APE
17 similar in concept to the baseline under CEQA or the
18 existing environment?

19 MS. NISSLEY: Yes.

20 MS. MILES: Thank you.

21 HEARING OFFICER RENAUD: All right.

22 Are there any further questions?

23 Thank you, Ms. Nissley.

24 Oh, you're thinking --

25 MS. FOLEY GANNON: One question, yes.

1 HEARING OFFICER RENAUD: Okay. We've got a
2 question.

3 RECROSS-EXAMINATION

4 MS. FOLEY GANNON: Ms. Nissley, under the
5 programmatic agreement as I read it and as I've been aware
6 in the PA meetings, do you read this provision as saying
7 the APE is going to be established later, or do you read
8 this as this is how they established the APE?

9 MS. NISSLEY: I'm sorry, I --

10 MS. FOLEY GANNON: I know you don't have the
11 programmatic agreement in front of you, but --

12 MS. NISSLEY: That's right.

13 MS. FOLEY GANNON: But I assume you're familiar
14 with the programmatic agreement.

15 MS. NISSLEY: Right.

16 MS. FOLEY GANNON: And did you read that, the
17 provisions about the APE as saying that it was going to
18 define the APE later or that this was explaining how they
19 defined the APE?

20 MS. NISSLEY: Again, I don't have it in front of
21 me, but my recollection is that's a description of how
22 they defined the APE.

23 MS. FOLEY GANNON: Thank you.

24 And the way they described defining, as Hearing
25 Officer Renaud read to you, the areas that they were going

1 to look at for the types of, you know, traditionally
2 cultural sites that you were describing, said that they
3 were going to consult with tribal members and other
4 individuals who may have something to offer about how far
5 they should be looking out.

6 Does that seem like an appropriate way to go
7 about defining the APE?

8 MS. NISSLEY: Right, but it should have been done
9 prior to the project, they should have discussed the APE
10 in consultation with Native Americans and other
11 communities.

12 MS. FOLEY GANNON: And do you know that that did
13 not occur during the consultation?

14 MS. NISSLEY: According to the tribal members
15 that have spoken at various programmatic agreement
16 meetings and so on, they said no, it did not occur.

17 MS. FOLEY GANNON: And was that because, as you
18 said earlier, because the tribal members don't want to
19 identify -- or potentially because they don't want to
20 identify their significant cultural sites? That's one of
21 the problems?

22 MS. NISSLEY: I think, if I'm understanding what
23 tribal members have said in this case, I think they
24 weren't asked in terms of being consulted about what might
25 be APE(b).

1 MS. FOLEY GANNON: And if they had been
2 consulted, that would have been appropriate.

3 MS. NISSLEY: Yes.

4 MS. FOLEY GANNON: Okay.

5 MS. NISSLEY: They might not have specifically
6 identified areas like this rock outcrop and that mountain
7 but they would have said we think the APE should extend
8 out here.

9 MS. FOLEY GANNON: So if there was evidence to
10 show that they had been asked that question, you think
11 that would have been appropriate.

12 MS. NISSLEY: Yeah.

13 MS. FOLEY GANNON: Great. Thank you.

14 HEARING OFFICER RENAUD: All right.

15 Are there further questions?

16 MS. MILES: No.

17 HEARING OFFICER RENAUD: Thank you, Ms. Nissley.
18 We're done.

19 MS. NISSLEY: Okay. Thank you.

20 HEARING OFFICER RENAUD: All right.

21 Now CURE, do you have any further witnesses or
22 testimony?

23 MS. MILES: One more.

24 Just kidding.

25 HEARING OFFICER RENAUD: Let me just check with

1 Mr. Budlong.

2 Are you going to call any cultural witnesses,
3 sir?

4 MR. BUDLONG: No, I am not.

5 HEARING OFFICER RENAUD: All right.

6 And I take it, Native Plant Society, you're not
7 there?

8 All right. Very good. I think it's probably
9 then a good time for a break.

10 MR. BABULA: Actually, I would like to do just
11 one quick -- there's a typo I noticed in one of the 500
12 pages in the cultural resource section that is kind of
13 important. And I'd just like to just clarify and change
14 it now, and with Mike here, so we could just get that into
15 the record.

16 It's on page C.3/140. It's in the paragraph
17 that's got the caption "Identification and Assessment of
18 Direct Impacts, Built Environment Resources and
19 Recommended Mitigation."

20 So I'll let everybody get to that page.

21 HEARING OFFICER RENAUD: Got it.

22 MR. BABULA: Okay. So the first sentence, I'll
23 just read it. "Whereas determinations regarding NRHP or
24 CRHR eligibility of built environment resources within the
25 project area of analysis have not been completed,

1 identification and assessment of impacts," that "cannot"
2 should be "can be assessed at this time."

3 HEARING OFFICER RENAUD: Okay.

4 MR. BABULA: You want to just verify that, Mike?

5 MR. McGUIRT: Verified.

6 HEARING OFFICER RENAUD: Let the record reflect
7 that Mr. McGuirt, who is the author of the section and
8 whose testimony this is, has confirmed the correction.

9 MR. BABULA: Thank you.

10 HEARING OFFICER RENAUD: All right. Anything
11 further on cultural resources?

12 All right. Hearing none. I'd say it's an
13 appropriate time for a quick break, and then we'll come
14 back and attend to the workshop report and some other
15 items. So we'll see you at -- in 15 minutes.

16 (Recess.)

17 HEARING OFFICER RENAUD: First order of business,
18 we had kind of a false start a few minutes ago, so I'm
19 going to ask that the reporter not transcribe the false
20 start which runs from 5178 to 5212.

21 Next order of business, we've had a request for a
22 tribal elder to provide public comment at this point, and
23 we've granted that request. And so before we proceed to
24 anything else, we're going to ask Ms. Jennings down south
25 to allow the gentleman to comment.

1 Can you hear us?

2 MR. ARROWWEED: My name is Preston J. Arrowweed,
3 I'm from the Quechan tribe, but I'm also Kumeyaay.
4 Kumeyaay and Quechan. My ancestors came from Imperial
5 Valley, near New River, my grandmother came from there.
6 She spoke Kumeyaay, and I speak Kumeyaay also, and
7 Quechan, both dialects. I can sing songs, the Kumeyaay
8 songs that go from evening to morning. I also sing a
9 Quechan song that goes from evening to morning too, in
10 Quechan. So I speak both dialects.

11 Now, I've heard so many things about this -- what
12 you're doing now, and I just can't understand why you
13 don't accept the fact that it is a place that should be
14 left alone. I even heard something about 40,000 years ago
15 that might have happened. 40,000 years is a long time
16 ago. There are places just 1,000 years, and they're
17 revering it and protecting it; and here we are talking
18 about 40,000; it might be, I'm not sure yet.

19 You have people like NECO and NEPA, CEQA, and all
20 kinds of organizations that are not doing nothing yet to
21 do anything because they want to hear from the Native
22 American, the Quechan, the Quechan in this area. You
23 know, and I've heard things like if there's something
24 important, maybe you can put concrete over the site. To
25 me, if you can do that, then you can put concrete over

1 Bibles and end religion if you want to. And then, of
2 course, you have cultural reasons, scientific reasons or
3 religious reasons. I'm not going to go into religious
4 reasons.

5 But, you know, I can -- I know these songs for
6 instance. You come to this country, you've written all
7 your laws, your rules, and everything that you go by; and
8 yet our rules and our laws are very simple, it's told in
9 our songs, it's like an oral history, and it's been to
10 left to us, or to me, and I tell the others that, my
11 people about that.

12 Now, you talk about -- I heard you mention so
13 many things of this law and this law, but yet it's so
14 simple in our way, which a long time ago, it is the land
15 that is named and now you know it, it is the land that is
16 named and now you know it. And we're talking about this
17 land in this area. And in the ancient Kumeyaay dialect,
18 it says -- (spoken in other language) -- it is the land
19 and it's named and now you know it. (Foreign word) is
20 named -- (spoken in other language) -- you know it's
21 named, and now you know it.

22 And it also said the land, you know, has been
23 given to you. So it says -- (spoken in other language) --
24 it means the land you know, it has been given to you.
25 This is what we're talking. Before anyone came here,

1 that's what we sang on this land.

2 I went out in that area there, and they showed us
3 a certain site that had lithic scatters all over it,
4 pottery shards all over, all over the place. Must have
5 been a big village. Well, we talked there for a while.
6 And then I was making my own way back and I walked into
7 another site that had pottery scatters all over. And I
8 said, have you got this one on record? They said no, but
9 they're all over the place. And if they're all over the
10 place, then why are you taking this?

11 And I said, you know, you don't realize that
12 people touched these scatters, this pottery, they made it
13 with their hands. Once you touch them -- they're all
14 destroyed and smashed and probably buried, but it came to
15 the surface when the wind came. Because they -- once
16 someone touched, you leave it alone, it's meant to be
17 buried there.

18 And wherever people lived just east of that area,
19 there's a cremation, always has a cremation near their
20 land, near their home, their house. They cremate. They
21 come back and destroy the house too where they lived and
22 everything in it, which is that pottery, they're smashed,
23 anything wooden is burned, and they bury it and leave it
24 there, not to be touched again. And who can say when it
25 is time to go back? Us, because we did it, not you. Not

1 the federal government who suddenly decides to go back,
2 no, it is us, those who have the knowledge can say when we
3 go back again. And that thing -- all those things there
4 can not be disturbed. And you cannot move it. You can't
5 even move a cremation.

6 Now, cremation is something that you don't know
7 about either. Today the Quechan and the Kumeyaay still
8 cremate. Now, part of my learning was to take part in
9 this cremation as a young man. I went with them. I went
10 there. I helped cut wood, helped get arrowweeds, I helped
11 dig some of the ground. And when they set up, I helped
12 set it up too. And then I even went to -- when they went
13 to pick up the body, I helped pick up the body and
14 everything, took it back, even put the body in there. And
15 I helped put the wood in there and piled whatever -- all
16 their belongings there. And we cremated and burned
17 everything. And I stayed behind and put more wood in that
18 hole until it was burned into just white powder. I've
19 done that. I did it about six times when I was a young
20 man. I was learning about cremation.

21 Now there are men back there who do it -- who do
22 this all the time. Now, they're more knowledgeable about
23 this or they have more experience. I don't think you
24 called those who have this experience in the cremation.

25 And I've done that, so I think I know a little

1 bit more about cremations more than your Ph.D.s who go on
2 to these universities, because you haven't gone to our
3 university where we taught and how we went out there. So
4 that makes me feel that it's important.

5 When I walked around where the cremations took
6 part, I felt the presence of people. Now, when I was out
7 there in that area, where all those lithic scatters were
8 and all those potteries and things, I felt that same way
9 again. I was walking around in a place where there are
10 many people. They're out there. But you don't feel it
11 because it's not your belief, it's not your way.

12 And you talk about having the -- it's a public
13 land. Is that a Native American public or non-Native
14 American public? They don't understand that. You cannot
15 say it's public land. You're going to have to separate
16 that if it's a public land, even though it's a public
17 land, it's still a Native American, Quechan, Kumeyaay,
18 that's their place. And I don't think it should be
19 disturbed, should ever be disturbed.

20 And I heard about the Coyote Mountain. That is a
21 story that the Kumeyaays talk about. When they moved out
22 of Imperial Valley and went up towards San Diego area, up
23 into the mountains, they used that story. But the Coyote
24 Mountain is a bigger -- it's in a bigger picture.

25 And then you forgot also to mention Mount Signal.

1 And in the Kumeyaay dialect, it is not Mount Signal, it's
2 Eagle Mountain. And that's the Kumeyaays' Eagle Mountain.
3 Now, that mountain is more important than anything because
4 in the story there were four eagles. The Creator's son
5 went back into the ground for four days, and when he came
6 back, he came back as four eagles. And the one that --
7 there was one for the west, the north, the east, and the
8 south. The south, the eagle to the south was called the
9 fish eagle, the (foreign language word), fish eagle.
10 (foreign word). The fish eagle is there on Mount Signal,
11 or as we call it, Eagle Mountain, (foreign word).

12 And I can believe that's true because this was a
13 lake where there was many fish, maybe that's where they
14 stayed at; that's why they named it Eagle Mountain. So
15 that's an important area too. And it overlooks this area,
16 that's where they lived, that's where they ate, right on
17 the shoreline. And I know that they found some fish bones
18 there too, what they ate. It shows you that they had a
19 connection to that water.

20 So to me, I think that's very important, and to
21 me all of the things that you're talking about today, it's
22 lost in this dialog and scientific language, technical
23 language, government language, and not much in religion,
24 not our religion.

25 And then why do you want this project on cultural

1 sites all the time? You always pick that. And BLM and
2 energy commission, they make decisions; and what about the
3 proper treatment of things that they find? And NEPA, CEQA
4 and everybody's supposed to do something about it. The
5 cultural reasons, scientific reasons, and religious
6 reasons, and putting concrete over some of these things
7 that they find.

8 And then you say OHV has destroyed a lot of the
9 sites. Well, if they destroy enough for you to move in,
10 somebody sent them in, maybe sent them in to destroy, and
11 now you think it's been destroyed enough that you can go
12 in and do what you want to do? You can never destroy it.
13 Even showing up there with shovels and picked up
14 everything out there, you haven't destroyed the true
15 self-fire, which means (foreign word), means the
16 self-fire.

17 In your language you call it spirit or soul, we
18 call it "self-fire." It's out there, you can't move that,
19 that will always be there. You can pick up everything --
20 anything out there, but you can not move that, but you
21 think you can by removing these things; no, they're still
22 out there, that's too strong for you. And I don't know
23 why you think that you can make decisions against this
24 belief. You cannot move that belief, no more than you can
25 move your belief and your Bible that you swear by in order

1 to do something official, you swear by that. And that's
2 the same as I am sworn, or I believe in my ways that I
3 just say no to what you're doing, it's wrong.

4 And I don't think that -- I also heard that
5 potential for discovery for construction, what if you do
6 find -- you haven't looked, you don't even know what's
7 under there. You're only on the surface. It could be
8 more under there. But you want to destroy it before we
9 ever know anyway.

10 I thought science was important to man, and
11 especially in the United States, because we don't know how
12 long man has been here. Well, this area, we were here a
13 long, long time. Even -- we go before the Aztec, we go
14 before the sites over there in Illinois, those mounds, we
15 were here before that. But you don't seem to understand
16 that the belief and religion is so strong -- and I heard
17 40,000 years ago, 40,000 is a long time, okay.

18 You know, and another thing is about you and the
19 BLM, you know, that the Native American, that I am
20 supposed to be as Native American -- I am supposed to a
21 ward of the government; and as a ward of the government,
22 they should protect me. But does that mean that they
23 don't protect my religious freedom? Does it mean that
24 they cannot protect me from feeling uneasy about what
25 you're doing? Am I supposed to -- the federal

1 government's supposed to let me go along with you? They
2 can't do that. And the BLM who does all of this under the
3 interior department, interior department is supposed to
4 protect us, and they haven't done it, and they all work
5 together.

6 The land is a part of the tribe, and the
7 non-native public is in charge of it. No, I think it
8 should be the Native American. The non-native public has
9 no knowledge of the past or that land there.

10 And, you know, it really does surprise me that
11 you talk about cremations and you don't even know anything
12 about it. To me, it's like taking advantage of people
13 right now who don't know what's going on out there, and
14 I'm talking about my people.

15 There's not that many people coming to this
16 meeting, but you should go to them. And I heard that you
17 should inform them first before you start doing this
18 proceeding. I mean, I get this thing, this message after
19 they've already made this application, after they do all
20 kinds of things, and hey, guess what, we're going to do
21 this. They should have done it before that. I think BLM
22 should come over and tell us, hey, they're planning to do
23 this, what do you think about it, you know? I think they
24 should do that.

25 So based on those things and those songs that I

1 say, I just almost sang it to you, but I could sing that
2 if I had to, but that's what I go by. And you go by what
3 you believe and what you're doing, but you are totally
4 wrong, and I believe that all they'll do, something will
5 come of this, something will go wrong. It does. Every
6 time you go against the belief, something comes up, and it
7 will. But right now we don't know and we don't care.
8 Right now we just want it done, that's all.

9 And I look out there and I see all the scatters,
10 all the things that -- I kind of think of that, I can feel
11 it, they're out there somewhere. But I can't see them,
12 but I can feel them. And I heard that eligible sites will
13 not be impacted, and they said they'd go around it. I
14 don't know how you can do that. I mean, no matter what
15 you do, you're still in that area of that -- that
16 self-fire. You're disturbing that by going in there and
17 going around and whatever.

18 And I think that, also, you got to think about
19 the ecology. They think that the desert is barren,
20 there's nothing out there. No, there are living things
21 out there too. A snake is important, a lizard is very
22 important. And lizards, a lizard took part in the
23 cremation. As a matter of fact, he's the one that lit the
24 fire, the four corners of the fire, the lizard did that.
25 And the fly did. There's flies out there. They'll come

1 out. And also the hawks are out there, that are
2 important. I heard that long -- big horned sheep could be
3 in that area, and I've seen some in Ocotillo before.

4 There are animals out there. There are different
5 living species out there. And you can't take those
6 species and destroy the little area where they live at.
7 When you do that, you're wrong again, because everything
8 has a purpose in life, ecology. When you destroy one, you
9 destroy another; it keeps going. You can't stop that. So
10 what you do, you want to sacrifice, you want to sacrifice
11 this for progress? That's not right. You want to
12 sacrifice this for that.

13 You are making the decision what lives and dies,
14 and that's wrong. You have no right to do that. You
15 can't decide the life -- the life of a little lizard, or
16 you can't decide the life of a snake. You can't decide
17 the life of every living thing out there simply because
18 you want electricity. And if you get that electricity,
19 what do we get out of it? Nothing.

20 You're going to use that land, they're going to
21 get electricity, and they say they're going to have
22 employment for everyone. No, there's not going to be
23 employment. Few technicians, people from out of town,
24 imported to work. And Imperial County believes that the
25 employment is going to go up. We've got the highest rate

1 of unemployment. It's not going to change, never has
2 changed. And they brought everything in to Imperial
3 County, and nothing has changed; it's still unemployment.

4 So I believe that you just should -- just stay
5 out of there. As far as I'm concerned, you should stay
6 out of there because it is very important to me as the
7 tribal singer, as an elder, it's important to me. And I'm
8 sure others will feel the same way.

9 HEARING OFFICER RENAUD: Thank you very much for
10 your comment, sir. Appreciate that.

11 We will have a public comment period tonight for
12 anyone else wishing to comment starting at 5:30. And in
13 the meantime we have representatives of parties back in
14 the room and we have some orders of business to take care
15 of.

16 My sense is we maybe should talk about your
17 workshop status report first. That might sort of direct
18 us where to go next.

19 So who wants to take the lead on that?

20 Nobody. Okay. I'm going to have to nominate
21 somebody I guess.

22 Mr. Thompson, yes, are you volunteering your
23 co-counsel?

24 MS. FOLEY GANNON: Apparently.

25 MR. THOMPSON: No, no, no.

1 Go ahead.

2 MS. FOLEY GANNON: Okay. I think it probably --
3 most of the discussion at the workshop was related to the
4 biological conditions, so it probably makes sense, and
5 also as soon as we have all of the biological staff people
6 sitting here, it probably makes sense to go through those
7 first.

8 The first conditions we were discussing in bio
9 numerically, the speed limit ones are 4 and 6; is that
10 correct?

11 MS. NISHIDA: No, speed limits on Bio 6 --

12 THE REPORTER: Could I get you to identify
13 yourself, please?

14 MS. NISHIDA: Joy Nishida, California Energy
15 Commission biologist.

16 HEARING OFFICER RENAUD: Let me -- going to ask
17 if you're going to be working from this document that was
18 passed out.

19 MS. FOLEY GANNON: That is our document. And I
20 think staff is working off something else which they are
21 not passing out? Or are you passing out?

22 HEARING OFFICER RENAUD: All right. Okay. Well,
23 proceed. That's fine. We don't -- if you have copies,
24 great.

25 MS. HOLMES: We can -- yes, we have copies for

1 everyone, and we can mark this as Exhibit 147.

2 HEARING OFFICER RENAUD: The Imperial Valley
3 Solar revised conditions?

4 MS. HOLMES: Right.

5 HEARING OFFICER RENAUD: It says "Exhibit,"
6 blank, "to Marc Van Patten's testimony." Let's not do
7 that.

8 MS. FOLEY GANNON: That is an error.

9 HEARING OFFICER RENAUD: Let's call it 147.
10 Thank you.

11 (Applicant's Exhibit 147 was marked for
12 identification.)

13 HEARING OFFICER RENAUD: All right. And we've
14 also just received a red lined strike out copy of bio
15 conditions from staff. So --

16 MS. HAMMOND: And can we mark this for
17 identification, I think it's Exhibit 308.

18 HEARING OFFICER RENAUD: 308, yes, we will.

19 MS. HAMMOND: And this is entitled "Agreed Upon
20 Changes to Conditions of Certification for Imperial Valley
21 Solar Project."

22 HEARING OFFICER RENAUD: All right.

23 (Staff's Exhibit 308 was marked for
24 identification.)

25 MS. JENNINGS: Excuse me. This is

1 Jennifer Jennings. Can we display this on WebEx?

2 HEARING OFFICER RENAUD: All we have here is
3 paper copies, I don't think we have that capacity.

4 MS. MILES: Can they be e-mailed out? I know
5 they have a computer there.

6 MS. NISHIDA: This is a summary of agreed upon
7 conditions. This isn't -- this isn't something -- we
8 haven't worked out all the issues --

9 HEARING OFFICER RENAUD: This is a working
10 document, in other words. Yes.

11 MS. HAMMOND: This is a working document, it's a
12 summary, it doesn't contain the full conditions and the
13 precise language hasn't been finalized or shared with any
14 of the other parties.

15 HEARING OFFICER RENAUD: But it's an exhibit. So
16 you're showing this to show you're making progress, right?

17 MS. HAMMOND: That's right.

18 HEARING OFFICER RENAUD: Well, maybe -- why don't
19 we start -- what are your differences still?

20 MS. FOLEY GANNON: What are our differences
21 still --

22 HEARING OFFICER RENAUD: On Bio.

23 MS. FOLEY GANNON: I think our most significant
24 difference remains with Bio 17.

25 HEARING OFFICER RENAUD: And I take it that's the

1 mitigation.

2 MS. FOLEY GANNON: That is the mitigation for the
3 big horned sheep and waters of the state, waters of the
4 U.S.

5 HEARING OFFICER RENAUD: So 10, you're okay?

6 MS. FOLEY GANNON: 10 we are conceptually in
7 agreement, and I think we can set out what we have talked
8 about. We have agreed to provide for long-term
9 management, funding for long-term management. We are
10 using as a placeholder the number that was in the
11 supplemental staff assessment on a per-acre basis. We
12 have requested though that a -- if a par analysis is done,
13 you know, which is the way of assessing how much the
14 annual cost is going to be, which comes with a different
15 number, that there would be a true up.

16 So if the agencies come up with a number that's
17 different than that, which we are hopeful will happen,
18 then that number would be changed to reflect that. But
19 until, unless and until that is done, we would use this
20 number as the basis for the securitization requirements.

21 We have at the workshop, the BLM presented
22 additional discussion saying that the parcel size they
23 believe was more -- should more accurately be set at
24 160 acres rather than 40 to reflect the type of mitigation
25 areas that would be purchased to satisfy this requirement

1 and the recent purchases that have been done. And so
2 staff, I think, concurred with that, with -- they want to
3 get confirmation from Fish & Game. But we concur with
4 that.

5 So in our revised conditions, the numbers that we
6 have included reflect then the \$500 an acre, which
7 everyone had agreed upon, that's not changed. We again,
8 used the, I think it's 692 of the long-term management
9 funding, and then we changed the -- the calculations that
10 are based on the parcel size to reflect the difference of
11 160 versus 40.

12 And then finally, we have asked for the phasing
13 of this mitigation to be allowed, and basically it would
14 be a Phase 1-A and a Phase 1-B, and then Phase 2 with the
15 payments being triggered, the security payments being
16 triggered prior to ground-disturbing activities associated
17 with each of those phases. So contemplating sort of a
18 limited notice to proceed in 1-A and 1-B, and then finally
19 2 we're not breaking down.

20 We understand that staff has some questions. We
21 submitted, and we would like to enter into evidence, or at
22 least marked for identification at the moment, the phasing
23 map that we docketed on Friday, which includes a figure
24 showing where 1-A is, as well as the activities that we
25 contemplate taking, being undertaken within that area and

1 associated with Phase 1-A. So we would mark that as
2 Exhibit 149.

3 HEARING OFFICER RENAUD: We're still talking
4 about 10, I hope.

5 MS. FOLEY GANNON: Yeah. Yes.

6 HEARING OFFICER RENAUD: Good. Okay.

7 MS. FOLEY GANNON: But this phasing is reflected
8 in three of the conditions.

9 HEARING OFFICER RENAUD: Yes.

10 (Applicant's Exhibit 149 was marked for
11 identification.)

12 MS. FOLEY GANNON: I don't know if we want to
13 talk about the concerns about the phasing or what
14 additional information is needed at this time.

15 MS. HAMMOND: Sure. This is Christine Hammond,
16 counsel for staff. And I'd like to concur with
17 Ms. Foley Gannon that there's a conceptual agreement on
18 the mitigation for Flat Tailed Horned Lizard loss of
19 habitat. The latest working number from the REAT agencies
20 on the REAT table is 160 acres per parcel; and we are in
21 agreement with that, again, subject to check with Fish &
22 Game.

23 But and so what's left to resolve is phasing,
24 which staff is cooperating with applicant and the parties
25 on. Our one concern, and we'd like to make sure that this

1 is clear and that there's agreement among the parties,
2 that when we pursue phasing, that the phasing or -- excuse
3 me, that payment of the security does stay ahead of
4 ground-disturbance activities. And applicant has
5 indicated in his brief that it concurs with that, that
6 principle. Just wanted to make that clear.

7 HEARING OFFICER RENAUD: Good. So that sounds
8 very promising.

9 MS. FOLEY GANNON: Yes, I think we're very close.

10 HEARING OFFICER RENAUD: Great. Great. All
11 right.

12 MS. FOLEY GANNON: And again, I think that the
13 details remaining is to make sure that the staff
14 understands exactly what we're proposing to have included
15 as part of 1-A; is that correct?

16 MS. HAMMOND: That's correct.

17 MS. FOLEY GANNON: And when we get -- we
18 understand they have a list of some additional information
19 they want. As soon as we receive that, we will provide
20 it, and hopefully we can have that resolved.

21 MS. HAMMOND: And the record, of course, does
22 need to stay open until that information comes in.

23 HEARING OFFICER RENAUD: Oh, of course.

24 MS. HAMMOND: Now, you know, in terms of
25 finalizing the language of the condition, that's something

1 that the parties can continue to work on. I don't think
2 the record needs to stay open for that. It can still come
3 in after the record's open, but we're still waiting for
4 the specific details of the phasing proposal.

5 HEARING OFFICER RENAUD: Good. Yeah, condition
6 changes could be made in the errata actually, as long as
7 they're not affecting the outcome.

8 So okay. Should we move to 17 then; or is there
9 one in between there?

10 MS. HAMMOND: I think Ms. Nishida wanted to
11 identify for the applicant those -- that information that
12 staff requires to evaluate the phasing proposal.

13 MS. FOLEY GANNON: That would help us move along.

14 HEARING OFFICER RENAUD: That's something that's
15 beyond what's in Exhibit 148 then?

16 MS. NISHIDA: Yes.

17 HEARING OFFICER RENAUD: Okay. Go ahead, please.

18 MS. NISHIDA: Okay. One of the questions that I
19 wanted to know was will the entire Phase 1 area be fenced?

20 MS. FOLEY GANNON: And the answer is no. That's
21 shown on this figure. There's a fencing -- or there's
22 supposed to be. I should look at it again.

23 If you look at the second to the last page of
24 that exhibit, there is a fencing plan. There's supposed
25 to be.

1 It may not have gotten on to this figure, but we
2 can revise the figure. It's supposed to be -- it will be
3 limited to the area of disturbance.

4 MS. NISHIDA: Okay. And -- all right. One of
5 the things I need to know is it -- all right, one of the
6 things I need to know too is with regards to linears, what
7 is the acreage of disturbance, particularly the water
8 line? How many acres of that water line will be within
9 the project site?

10 MS. FOLEY GANNON: I'm sorry, the question is how
11 many of the --

12 MS. NISHIDA: The disturbance --

13 MS. FOLEY GANNON: Which will be inside the
14 ultimate project boundary?

15 MS. NISHIDA: Yes.

16 MS. FOLEY GANNON: Okay. I don't have the answer
17 to that, but we can get that.

18 MS. NISHIDA: Okay. And let's see.

19 Another question I have is what are the total
20 acres of waters in the initial Phase 1 area in that --

21 MS. FOLEY GANNON: You know, we don't have that
22 calculated, and I can tell you when we get to discussing
23 in detail a little more Bio 17, we are not requesting to
24 phase our aquatic resource mitigation. We are proposing
25 to do that all up front at once. I mean, we're not --

1 we're not saying let's phase that as 1-A, 1-B impacts
2 based upon the actual number of acres of waters impacted
3 with each one of those phases, because it just doesn't
4 make sense with what we're proposing to do. So I'm not
5 sure that that number then is relevant to what you need to
6 make a determination on. And the reason we didn't
7 calculate it is because we're not asking for that phasing.

8 MS. NISHIDA: Okay. Other information, if
9 possible here is a -- how many acres of sensitive plants
10 will be impacted?

11 MS. FOLEY GANNON: I can certainly get that.

12 MS. JENNINGS: Excuse me. Could we ask the
13 questioner to identify herself?

14 MS. NISHIDA: This is Joy Nishida, CEC biologist.

15 MS. JENNINGS: Thank you.

16 MS. NISHIDA: Okay. I think that's it.

17 MS. FOLEY GANNON: We can get that to you, I
18 would think immediately. About to get the map done, but
19 we should be able to get that to you in a day.

20 MS. HAMMOND: I think on the question of your
21 payment of mitigation for Bio 17 up front and it not being
22 phased, we may have a follow-up question on that.

23 MS. FOLEY GANNON: Absolutely. And it is phased
24 in one respect, but it's not phased in respect -- based on
25 the number of acres of water disturbed. And we will --

1 when we talk about 17, we can describe what we're
2 proposing.

3 MS. HAMMOND: Okay. That's fine.

4 HEARING OFFICER RENAUD: You can just keep going.
5 We're listening avidly. Go on to the next Bio one that
6 you need to discuss.

7 MS. FOLEY GANNON: I think going to Bio 17 again,
8 this is probably the one area where we remain in sort of
9 fundamental disagreement with the staff's conclusions
10 about what is appropriate and necessary to mitigate the
11 identified impacts. We have presented our evidence, they
12 have presented their evidence. This is -- in my view is
13 probably one we're going to have to leave up to you to
14 resolve and look at.

15 And what we have proposed is, assuming that you
16 agree with us about the necessary level of mitigation and
17 the appropriate mitigation, we have set forth proposed
18 language which would articulate the preferred mitigation
19 which has been identified by the Corps of Engineers and
20 the BLM and has been developed in consultation with the
21 U.S. Fish & Wildlife Service and setting forth what that
22 requirement would be.

23 Again, we have provided for funding for the
24 long-term management of this area. For that calculation
25 we have provided, you know, the monetary amounts we assume

1 it will take to -- cost to carry out this effort as well
2 as the initial five years of monitoring. And then the
3 long-term funding for those efforts.

4 What we have proposed in phasing is to allow us
5 to pay for all of the amount that is necessary to cover
6 the actual execution of the mitigation, the carrying out
7 of the mitigation measures, the initial efforts, which
8 represents about half of the total amount with 1-A and
9 before 1-B to provide the funding that will be necessary
10 for the five years of monitoring and the long-term
11 management.

12 We think that it's reasonable that you could make
13 that type of phasing based on the fact that the 247 acres
14 of aquatic resource mitigation would be paid up front and
15 a much, much smaller subset of impacts would actually
16 occur associated with 1-A and by 1-B, the whole long-term
17 monitoring would be funded for the entire project, again,
18 much in advance of the impacts associated with Phase 2.
19 So that is our proposal.

20 And then we have, you know, left in there
21 provisions if another mitigation measure was chosen,
22 instead of doing the Carrizo Creek kind of the standards
23 that would be applied to that determination. So that's
24 what we're proposing.

25 MS. HAMMOND: So I guess I just need

1 clarification that if the committee and the commission
2 were to accept staff's recommendation, would you -- that
3 payment, about half the security, be made up front based
4 on staff's numbers?

5 MS. FOLEY GANNON: I have so not been thinking
6 that that's what's going to happen that I have to say I
7 don't have an answer. Can I let him -- Mr. Van Patten
8 look at the numbers, and we can come back to this --

9 MS. HAMMOND: Sure.

10 MS. FOLEY GANNON: -- and discuss it after we go
11 through the other conditions?

12 Just give me one second.

13 HEARING OFFICER RENAUD: Well, if I could ask
14 Ms. Hammond, could you summarize -- or one of you,
15 summarize what the dispute is here.

16 MS. HAMMOND: The dispute is the number of
17 acres --

18 HEARING OFFICER RENAUD: That's --

19 MS. HAMMOND: The applicant can correct me if I'm
20 wrong, it's the number of acres that are waters of the
21 U.S., waters of the state, and Peninsular Big Horn
22 Sheep -- or the amount of acres that are required for
23 mitigation to impacts to foraging habitat for Peninsular
24 Big Horn Sheep.

25 MS. FOLEY GANNON: Right. My understanding is we

1 are not in disagreement about the impacts to aquatic
2 resources themselves, waters of the state, and waters of
3 the U.S. or the appropriateness of the mitigation proposed
4 for that, and that was -- Fish & Game said, at the
5 workshop, that they agreed with that. And I understood --
6 I didn't hear any disagreement with the aquatic resource
7 impacts; is that correct?

8 So I thought that -- think that the entire
9 dispute is about what is necessary to mitigate for the
10 impacts to the big horn sheep.

11 MS. HAMMOND: Excuse me, you're right.

12 HEARING OFFICER RENAUD: And is the nature of the
13 mitigation in dispute; that is, the characteristics of the
14 land?

15 MS. FOLEY GANNON: I think it's the amount.

16 MS. HAMMOND: It's the number of acres. And what
17 constitutes foraging habitat and what needs to be
18 mitigated.

19 HEARING OFFICER RENAUD: All right. Well, isn't
20 this the area where some of the discussion was about
21 Tamarisk removal?

22 MS. FOLEY GANNON: That's what the proposal is,
23 and I don't -- I think that there isn't disagreement, that
24 that's appropriate mitigation, it's how much we have to
25 do. We're suggesting 247.

1 HEARING OFFICER RENAUD: Okay. And you're --

2 MS. HAMMOND: Well, I have to correct that.

3 I think there is some disagreement as to whether
4 or not Tamarisk removal alone is appropriate mitigation.

5 HEARING OFFICER RENAUD: Okay. Well, I'm sure
6 it's all in the evidence, and we can -- we can come to a
7 decision based on substantial evidence that neither of you
8 will like.

9 MS. FOLEY GANNON: That neither of us will like?

10 HEARING OFFICER RENAUD: Yes.

11 MS. FOLEY GANNON: That's not making me feel
12 good.

13 Okay. So I think that's where we are with Bio --

14 MS. HAMMOND: And so we'll come back to --

15 MS. FOLEY GANNON: -- 17. We will come back to
16 that when Mr. Van Patten has a chance to look at the
17 numbers.

18 HEARING OFFICER RENAUD: All right. So is that
19 all we need to talk about with Bio?

20 MS. FOLEY GANNON: There's one other.

21 HEARING OFFICER RENAUD: Okay.

22 MS. FOLEY GANNON: Or maybe a couple of others,
23 but these are sort of the main substantive ones.

24 In Bio 19, which is the special status plant
25 mitigation, I think we have just come to an agreement

1 about allowing for -- we have already agreed to have
2 avoidance of the List 1 species. And we can agree to have
3 avoidance of the List 2 species for the off-site linears.
4 And on the on site, we are going to -- we are still
5 proposing to do mitigation, compensatory mitigation. That
6 does not reflect in what we gave here because this is a
7 discussion we had with staff moments before coming back.

8 HEARING OFFICER RENAUD: Okay. Anything to add
9 to that, staff?

10 MS. HAMMOND: That is our conceptual agreement.
11 I just wanted a clarification that avoidance would be
12 required under this conceptual agreement for CNDDDB Rank 1
13 plants as opposed to CNPS Rank 1 plants.

14 MS. FOLEY GANNON: That's acceptable, yes.

15 MS. HAMMOND: And avoidance on the linears is
16 required for CNDDDB Rank 2 and CNDDDB Rank 1.

17 MS. FOLEY GANNON: Conceptually, I believe that
18 that's accurate, I just want to check with my biologist.

19 Angela or -- Angela or Pat Mock, are you on the
20 phone? Are you muted on the phone?

21 MS. LEIBA: Can you hear us now?

22 MS. FOLEY GANNON: We can hear you now. Yes,
23 thank you.

24 Have you been listening to the conversation?
25 We've been talking about if the avoidance is for Rank 1

1 and 2 or -- Rank 1 for all of the features, and then for
2 the off-site linears, Rank 1 and Rank 2 instead of List 1
3 and List 2 as we had put in our condition.

4 Is that acceptable?

5 DR. MOCK: Well, I think it is. I just want to
6 clarify, Joy --

7 MS. FOLEY GANNON: I'm sorry, just one moment,
8 Pat.

9 This is Patrick Mock from URS, M-o-c-k.

10 I'm sorry, go ahead.

11 DR. MOCK: Joy, are there any Rank 1 species
12 detected? I'm not quite sure whether there's any Rank 1
13 known because they're all -- they're List 2 species under
14 CNDDDB or under CNPS, but I wasn't aware that any of them
15 made it to the Rank 1 on CNDDDB. Can you clarify that?

16 MS. NISHIDA: Brown Turbans is a Rank 1.

17 DR. MOCK: Okay. So we would need to avoid the
18 Brown Turbans.

19 MS. NISHIDA: 75 percent.

20 And, of course, there's Wiggins' croton. And you
21 were saying that we would be avoiding that.

22 DR. MOCK: Yeah, I think -- it's detection was
23 like 60 feet off from where they intend to put the line,
24 so we felt that we could avoid it.

25 MS. FOLEY GANNON: But does the -- so if the

1 Brown Turbans is a Rank 1, that would require complete
2 avoidance both on site and with the linears. Is that
3 possible?

4 DR. MOCK: 75 percent.

5 MS. FOLEY GANNON: 75 percent, I'm sorry.

6 DR. MOCK: The -- the Brown Turbans are mostly on
7 the very, very boundary of the project site, so it's just
8 a matter of where they are relative to your -- your limit
9 of disturbance relative to your setback from the highway
10 and from the adjacent BLM lands to the east. That's where
11 most of them are found.

12 So isn't there like a 2- or 300-foot setback from
13 the highway?

14 MS. FOLEY GANNON: 223.

15 DR. MOCK: How much?

16 MS. FOLEY GANNON: 223.

17 DR. MOCK: So some of them might be within that
18 setback area.

19 MS. FOLEY GANNON: Okay. I think we are in
20 conceptual agreement. Again, we don't have that language
21 drafted yet, but I think we have the same concept.

22 HEARING OFFICER RENAUD: Okay. Sounds good.

23 MS. FOLEY GANNON: The other point that we had
24 put and we had talked to staff about right before this,
25 towards security for this measure, and I think this was

1 what staff was contemplating before, but it wasn't
2 entirely clear, the intent is that the lands that are
3 obtained for the Flat Tailed Horned Lizard will also, we
4 hope, have any plant compensation that is necessary. And
5 so we are proposing that the mitigation be nested and the
6 security be nested in the event. And we specify this
7 clearly in this condition now, in the event that those
8 plants are not found in that land, then we would provide
9 additional security and we'd have to provide additional
10 mitigation. But just to make sure that that's clear. So
11 that's in the language that we've proposed.

12 MS. HAMMOND: And we would support nesting
13 wherever possible as long as the criteria are met as set
14 forth in the conditions.

15 MS. NISHIDA: Yeah, and if I recall correctly,
16 it's already in the condition.

17 HEARING OFFICER RENAUD: All right. That's good.
18 So it sounds like you don't need us to decide anything
19 about this one.

20 MS. FOLEY GANNON: I think we should be good with
21 that.

22 I think we're going to have a hard time getting a
23 precise answer on the question about 17, because when we
24 were looking at these numbers, obviously, because it's
25 881 acres versus 247, it's a big difference in numbers.

1 So we would -- I mean, if we were -- if the
2 commission decided that the 881 was necessary and it's
3 preservation of foraging habitat, then we would also be
4 looking to see if some of that could be specifically
5 nested with the Flat Tailed Horned Lizard, and if there
6 was ways --

7 MS. NISHIDA: It's already in there.

8 MS. FOLEY GANNON: Well then, how would you
9 figure the security again? I mean, would you be assuming
10 that that would all be with the Flat Tailed Horned Lizard
11 mitigation numbers in the 6,000 acres as a basic approach,
12 or what would you be thinking? Unless, otherwise, like
13 we're doing with the plants?

14 Okay.

15 HEARING OFFICER RENAUD: That was a nod yes for
16 the record from Ms. Nishida.

17 MS. HAMMOND: Are we on the record?

18 HEARING OFFICER RENAUD: Yes.

19 MS. HAMMOND: We can't agree to having nesting
20 security. It's -- nesting would occur when actual parcels
21 are identified. So that's not something we can agree to.

22 MS. FOLEY GANNON: So under your proposal, that
23 would be an extra \$1.6 million in security?

24 HEARING OFFICER RENAUD: Nesting of security when
25 the lands are the same, that is, you're opposed to that?

1 No?

2 MS. HAMMOND: Well, we're always in support of
3 nesting mitigation.

4 HEARING OFFICER RENAUD: Yes.

5 MS. HAMMOND: And that can occur when actual
6 parcels are identified so that we can compare the parcels
7 of land with the criteria set forth in the condition.
8 Until those parcels are identified, we can't assume that
9 nesting will occur.

10 HEARING OFFICER RENAUD: Okay. But it could.

11 MS. FOLEY GANNON: Even for plants, I mean, we
12 think it's reasonable to say that the plants -- because of
13 the small numbers that we're talking about are going to be
14 bound on the 6,600 acres of Flat Tailed Horned Lizard
15 mitigation lands for purchasing?

16 MS. HAMMOND: I don't know if that's reasonable
17 or not given -- I can only see -- I can look at the map,
18 and I can see that there are not that many occurrences of
19 special status plants. So I don't know that I can answer
20 that right now.

21 MS. FOLEY GANNON: Okay. Well, that's --

22 MS. HAMMOND: And I don't know if that is a
23 reasonable assumption whether or not that's a question of
24 something we can agree to or whether or not that's a
25 question of law, I can't say right now.

1 HEARING OFFICER RENAUD: Well, maybe --

2 MS. FOLEY GANNON: It seems that you have to have
3 substantial evidence that demonstrates that there's a
4 reasonable likelihood that this is going to cover in the
5 mitigation. And it seems to us that to assume, as you
6 said, a very small population of plants can be found on
7 mitigation lands in excess of 6,600 acres seems like a
8 reasonable assumption that would satisfy CEQA and any
9 other requirements. I mean, we also think that you could
10 do some nesting assuming that there would be ephemeral
11 washes on these lands on the Flat Tailed Horned Lizard
12 lands that would be acquired. I mean, that's the type of
13 habitat that they used. It's the sandy bottoms, I mean,
14 it's -- it's -- we don't think that that is an
15 unreasonable assumption.

16 And frankly, in terms of what matters to the
17 project, you know, these security amounts are a huge, you
18 know, a huge issue for being able to move forward.

19 MS. HAMMOND: Well, whether or not that's a
20 reasonable assumption, I think is testimony that's
21 appropriate for biologists --

22 HEARING OFFICER RENAUD: Let's -- we may get
23 there, but first, let me ask this: Suppose you allowed
24 the assumption with the proviso that if it turns out to
25 have been a wrong assumption, you'd un-nest.

1 MS. FOLEY GANNON: That's what we proposed. We
2 proposed it when the land was acquired and it didn't have
3 the plants, then additional security would be given, and
4 additional lands would have to be given.

5 MS. HAMMOND: Well, yeah, and that sort of
6 defeats of the whole purpose of having a security. The
7 security is being -- an applicant is allowed to put up a
8 security instead of paying mitigation before
9 ground-disturbing activities. And so that's sort of, you
10 know, the fulcrum, that payment has to be done before
11 ground-disturbing activities.

12 HEARING OFFICER RENAUD: I see your point. I see
13 your point. But maybe it would be useful to hear from the
14 biologists who are present as to whether or not that's a
15 reasonable assumption.

16 Without putting you on the spot, that's too
17 hypothetical, but if you -- if you could enlighten the
18 committee, that would be a big help to us.

19 MS. NISHIDA: Well, one of the reasons why I
20 split out the big horn sheep foraging habitat compensation
21 was we were expecting some nesting of mitigation, but we
22 weren't certain what it was. And at this point, I -- you
23 know, so what I did was I put the maximum amount of
24 acreage, in case there wasn't any nesting. That's how I
25 came about this figure.

1 HEARING OFFICER RENAUD: On this specific issue
2 of the likelihood of finding the special status plants on
3 the lizard mitigation lands, I think that's the assumption
4 we're interested in hearing about. Is that a safe
5 assumption?

6 MS. NISHIDA: You know, it -- you know, there's a
7 lot of -- from what I understand, I was looking at
8 distribution maps, and there is -- there are other plants
9 fairly close or other occurrences close by that could
10 possibly work as mitigation lands. And also, if it's not
11 off-site compensation, there's also other alternatives
12 such as acquiring -- not acquiring, but doing a -- doing
13 some sort of rehab or protection of existing plants within
14 protected areas.

15 HEARING OFFICER RENAUD: Mr. York, do you want to
16 add to that at all?

17 Use the mic. Thank you.

18 MR. YORK: This is Rick York. I'm a biologist at
19 the energy commission as well.

20 We -- as far as the big horn sheep, we were
21 thinking that the -- we need to split that one out because
22 it might be acquisition of habitat, may be different than
23 what may be required for the Flat Tailed Horned Lizard.

24 As far as the rare plants, there are very few
25 occurrences, but at the same time I think that we felt it

1 was somewhat higher likelihood that the compensation could
2 be nested and cover those, the plants and the Flat Tailed
3 Horned Lizard.

4 So a different comfort level depending on the
5 biology issue.

6 HEARING OFFICER RENAUD: Got it.

7 MR. YORK: Is that correct, Joy?

8 HEARING OFFICER RENAUD: And do you want to ask
9 Mr. Mock to weigh in on this?

10 MS. FOLEY GANNON: Dr. Mock, are you there?

11 HEARING OFFICER RENAUD: Dr. Mock, sorry.

12 DR. MOCK: I think the main problem was looking
13 at the positive data in terms of occurrences in terms of
14 the rare plants is that's what they are, it's the
15 limitation of survey effort in the general vicinity of the
16 site is low. Talking with Andrew Trussel of the BLM, they
17 haven't surveyed their lands that are already conserved,
18 and so there is high likelihood that --

19 MS. FOLEY GANNON: So you think there's a
20 reasonable likelihood that the Flat Tailed Horned Lizard
21 mitigation lands would have the same plants.

22 DR. MOCK: Yes, that's our opinion.

23 MS. FOLEY GANNON: What is your view about the
24 big horn sheep?

25 DR. MOCK: The big horn sheep, we've discussed

1 this with Fish & Wildlife Service, and they're in
2 agreement with us, as far as we know that --

3 MS. FOLEY GANNON: You mean with our proposal for
4 Tamarisk?

5 DR. MOCK: Proposal is consistent with the Fish &
6 Wildlife proposal requirement.

7 MS. FOLEY GANNON: Thank you.

8 HEARING OFFICER RENAUD: All right. Thank you.
9 Anything else on that one?

10 MS. NISHIDA: Yes. We've concluded that as far
11 as Fish & Game was concerned, that wasn't sufficient
12 mitigation for big horn sheep.

13 HEARING OFFICER RENAUD: What wasn't sufficient?

14 MS. NISHIDA: The Tamarisk removal in
15 Carrizo Creek.

16 MS. FOLEY GANNON: When did you hear that?
17 Because at the workshop she said she wasn't a big horn
18 sheep person and she wasn't commenting on it. So was that
19 something that happened subsequent to that conversation?

20 MS. NISHIDA: No, this is -- this is
21 communication I've had with Randy Botta with Fish & Game.
22 He's their big horn sheep specialist.

23 MS. FOLEY GANNON: And there's evidence of that?

24 MS. NISHIDA: I could put that in the record.

25 MS. FOLEY GANNON: Because we haven't had any --

1 we've never heard anything from -- and we've had many
2 conversations with, you know, the service, with the BLM,
3 with the corps, with, you know, the agencies that have
4 been participating and involved in the mitigation. So, I
5 mean, it kind of comes as a surprise to hear that there's
6 been something separate. And again, at the workshop, that
7 wasn't what was said.

8 MS. NISHIDA: Yes.

9 MS. FOLEY GANNON: And she said she wasn't a big
10 horn sheep person.

11 MS. NISHIDA: Right.

12 MS. HAMMOND: I wanted to make one more
13 contribution to this subject of nesting and whether or not
14 we can nest security even without having identified
15 parcels.

16 I did mention in my brief, and I won't rehash the
17 argument here, that each specific impact has to be
18 specifically mitigated. And given the uncertainty and the
19 using the security as a placeholder, I don't think it's
20 appropriate to nest security. So I just -- I'll leave it
21 to my brief, but I just wanted to put that out there.

22 HEARING OFFICER RENAUD: Thank you.

23 And since you mentioned the briefs, I wanted to
24 thank you all for the briefs, they're really very, very
25 good and very helpful. And you obviously put a lot of

1 work into them. So thank you. I'm looking forward to
2 those --

3 MS. FOLEY GANNON: You'll see some more.

4 HEARING OFFICER RENAUD: -- rebuttal briefs, or
5 reply briefs.

6 Okay. Anything else on Bio?

7 Any other conditions of certification you want to
8 talk about?

9 MS. FOLEY GANNON: There's a couple.

10 There's two of the visual -- which I need to get
11 the numbers. I'm sorry, hold on.

12 Which I think it was just a mistake because we
13 had talked about the 223-foot setback instead of the 300,
14 and it was corrected in some of them, but it was not
15 corrected in VIS 4 and VIS 6. So I think that that's just
16 a mistake.

17 HEARING OFFICER RENAUD: Right. That's my
18 understanding too.

19 MS. FOLEY GANNON: I just wanted to make sure, to
20 clarify that.

21 I think we still are in disagreement about
22 Soil and Water 2 and Soil and Water 9 related to how much
23 residential water use there is currently serviced by the
24 Boyer well. Again, I think you have the evidence from
25 both the staff and from the applicant on that issue.

1 Ms. Holmes is here.

2 I understood you were going to put in -- you said
3 in your opening brief some conditions in your reply brief
4 for TRANS 1, 2, and 4

5 MS. HOLMES: 3 and 4, I believe, 1, 2, 3, and
6 4 --

7 THE REPORTER: We need you at the mic,
8 Ms. Holmes.

9 MS. FOLEY GANNON: And my anticipation is that
10 those are timing corrections; is that right?

11 MS. HOLMES: Those are just responses to your --

12 MS. FOLEY GANNON: Okay.

13 MS. HOLMES: And I have the e-mail telling me
14 what the responses are, but I can't recollect them off the
15 top of my head. I think there's some thumbs up and some
16 thumbs down.

17 MS. FOLEY GANNON: More thumbs up the better.

18 The final one that we would like to raise, and we
19 didn't get an opportunity to discuss this at the workshop
20 because we ran out of time, but we came to, you know,
21 conceptual agreement on Worker Safety 7 and 8, which are
22 related to the fire department payments.

23 We are asking for, if you go to -- do we have a
24 copy of it here?

25 We are proposing language, and it's at the end on

1 page 52 of this handout, and what we want to have this
2 reflect is that there is a requirement to pay a \$2 million
3 security -- what?

4 MS. HOLMES: I'm sorry. Is there a handout that
5 was -- when I was not here?

6 MS. FOLEY GANNON: No, it's the same one,
7 Exhibit 147 that I gave you before.

8 And this relates again to Worker Safety 8 was
9 requiring a payment of a \$2 million in security, which is
10 to be in place until the actual amounts that are going to
11 be paid to the fire department are negotiated or resolved
12 as provided in Worker Safety 7; and we're just asking for
13 a clarification that says that in the event that that
14 agreement is reached prior to ground breaking, then this
15 \$2 million security doesn't need to be paid, you just go
16 with whatever you negotiate.

17 And this is the result of we are actually having
18 very positive conversations with the fire department, and
19 we are anticipating having an agreement in place prior to
20 commencement of 1-A.

21 MS. HOLMES: That sounds reasonable to me. I
22 obviously need to double check with the worker safety
23 people. It doesn't seem as though there's any new
24 evidence in the record, so it seems to me this would be
25 something I could address in the reply brief on Wednesday.

1 MS. FOLEY GANNON: Yes, that's right, that's
2 correct.

3 MR. MEYER: And, Hearing Officer Renaud, this is
4 Christopher Meyer, project manager. Since we're talking
5 about briefs and reply briefs, I just want to make a note
6 for people who may be trying to find things online.

7 To make it easier on both the Imperial and Calico
8 projects, we moved all of the testimony and briefs into a
9 dedicated folder on the website. So if people go to those
10 dedicated folders, they'll find all of them, instead of
11 being broken up throughout the website.

12 HEARING OFFICER RENAUD: Very good.

13 MS. FOLEY GANNON: Thank you.

14 HEARING OFFICER RENAUD: That's nice. Thanks.

15 MS. FOLEY GANNON: That's helpful.

16 HEARING OFFICER RENAUD: I'm just looking at
17 Worker Safety 7 and 8. I mean, they kind of -- it seems
18 like they play off each other. 7 talks about either
19 reaching an agreement or paying.

20 MS. FOLEY GANNON: Right.

21 HEARING OFFICER RENAUD: And then 8 seems to be,
22 what, providing security --

23 MS. FOLEY GANNON: Right.

24 HEARING OFFICER RENAUD: -- the new 8 would
25 provide security in the event that an agreement isn't

1 reached.

2 MS. FOLEY GANNON: And it just didn't say that
3 very important last sentence.

4 HEARING OFFICER RENAUD: Yeah.

5 MS. FOLEY GANNON: That in the event that
6 agreement is not reached. So we were just trying -- we're
7 just seeking clarity on that. Again, it's a two million
8 dollar item, so we'd like clarity.

9 HEARING OFFICER RENAUD: In the SA -- would you
10 like the floor mats too with that?

11 MS. FOLEY GANNON: I would.

12 HEARING OFFICER RENAUD: In the SA testimony,
13 there's a Worker Safety 8 about the dust control plan. Is
14 that --

15 MS. FOLEY GANNON: That's now 9 is my
16 understanding.

17 HEARING OFFICER RENAUD: That's going to become
18 9. All right. Okay.

19 Okay. Good. Any other conditions?

20 MS. FOLEY GANNON: I think those were the only
21 ones we had to raise.

22 HEARING OFFICER RENAUD: Staff, any conditions?

23 MS. HAMMOND: No, we don't have any more.

24 HEARING OFFICER RENAUD: Okay.

25 CURE, you want to weigh in on conditions?

1 MS. MILES: No.

2 HEARING OFFICER RENAUD: All right.

3 What else does anybody want to bring up before we
4 bring up some items?

5 MS. FOLEY GANNON: Yeah, we have a few exhibits
6 to move in, including those that we've already gone over
7 this morning. There are two other items that we've --

8 MR. THERKELSEN: There's actually three. The
9 phased construction one, I believe that, Mr. Renaud,
10 you've already referred to that as Exhibit 148 on the
11 record. So I would propose 148 for that one.

12 HEARING OFFICER RENAUD: That's what it is, yes.
13 (Applicant's Exhibit 148 was marked for
14 identification.)

15 MR. THERKELSEN: And the Imperial Valley Solar
16 submittal of Imperial County Fire Department letter, I
17 would ask that that be 149.

18 HEARING OFFICER RENAUD: Well, I think that's
19 already 144, unless it's a different letter.

20 MR. THERKELSEN: It's -- might be.

21 HEARING OFFICER RENAUD: Good. All right.

22 By the way, now that we're talking about exhibit
23 numbers, I -- during the break I distributed some new and
24 improved exhibit lists that correct some errors we've
25 recently discovered. They are the ones that the CEC

1 emblem is not in color; and there are some more up here on
2 the counter. If anybody needs another one, let me know.

3 Okay. Any other exhibits?

4 MR. THERKELSEN: Yeah, which will now be number
5 149, is the applicant's estimated first-year construction
6 water use summary.

7 HEARING OFFICER RENAUD: All right. And this is
8 in the information -- I think it was prepared in response
9 to request from staff.

10 MS. FOLEY GANNON: Yes, it was -- I think it
11 was -- CURE had requested it.

12 HEARING OFFICER RENAUD: I'm sorry.

13 MS. FOLEY GANNON: -- at the last round of
14 hearings.

15 HEARING OFFICER RENAUD: Right.

16 MS. FOLEY GANNON: And related to the exhibits,
17 in some of the late nights of the hearings, I'm not sure
18 that all of the exhibits actually got official moved into
19 the record, so we probably want to address that here today
20 as well.

21 HEARING OFFICER RENAUD: Well, I had that on my
22 list to address too. Because I think we've probably had
23 well in excess of 50 hours of hearings, including some
24 12-plus hour days. And when you're, you know, in the heat
25 of things, thinking about and talking about the evidence,

1 the niceties of things like exhibit numbers and saying the
2 magic words can get overlooked.

3 And I guess there may be two approaches to make
4 sure we have moved everything into evidence that you want
5 to move in.

6 One would be for -- and this is the hard one,
7 would be for each of you to tell me which exhibits from
8 your lists you want to move into evidence.

9 The other would be to assume that everything on
10 the list is stuff you want to be moved into evidence, and
11 ask if anybody has any objection.

12 MS. FOLEY GANNON: I go for the latter.

13 HEARING OFFICER RENAUD: Well, I think we could
14 unless anybody objects to that.

15 What do you think, Ms. Holmes?

16 MS. HOLMES: I think that's acceptable.

17 I did have a question that at some point about
18 whether or not something had been identified as an
19 exhibit.

20 HEARING OFFICER RENAUD: Okay.

21 MS. FOLEY GANNON: What was that?

22 MS. HOLMES: That's the late spring botany
23 report. I found the early spring botany report, but I
24 never found the late spring botany report, and we've both
25 relied upon it, so I think it should be in the record

1 either way.

2 MS. FOLEY GANNON: Yes, it should be in the
3 record.

4 HEARING OFFICER RENAUD: Well, if it's not, shall
5 we call it 150 just in -- even if it is, we'll have it
6 twice.

7 MS. FOLEY GANNON: Yes.

8 HEARING OFFICER RENAUD: Late spring botany
9 report, 150, and perhaps something previous to that.

10 (Applicant's Exhibit 150 was marked for
11 identification.)

12 HEARING OFFICER RENAUD: Thank you. Good point.

13 MS. FOLEY GANNON: Thank you.

14 HEARING OFFICER RENAUD: CURE, what do you think
15 about that?

16 MS. MILES: Sounds good to me.

17 HEARING OFFICER RENAUD: Okay. Mr. Budlong, are
18 you still there? Mr. Budlong?

19 Anybody from CNPS? Anybody there?

20 All right. Well --

21 MS. HOLMES: Can we make sure that that includes
22 the two documents that staff requested official notice of
23 in their brief, in our brief?

24 HEARING OFFICER RENAUD: If they're not on your
25 list -- well, if you're asking official notice, we

1 probably don't need to make them exhibits.

2 MS. HAMMOND: Well, I'm sorry, we requested
3 official notice. I think it might be easier if we just
4 identified them, they have been docketed, and if they
5 could just come into the record that way.

6 HEARING OFFICER RENAUD: All right. So why don't
7 you name them for us.

8 MS. HAMMOND: I'd ask that we mark the Grant and
9 Doherty Flat Tailed Horned Lizard monitoring study as
10 Exhibit Number 309.

11 HEARING OFFICER RENAUD: I think you submitted
12 that too, didn't you, applicant? Oh, you docketed it,
13 that's right.

14 MS. FOLEY GANNON: Right.

15 HEARING OFFICER RENAUD: You didn't put it in.
16 Okay.

17 (Staff's Exhibit 309 was marked for
18 identification.)

19 MS. HAMMOND: And marking for identification as
20 310, the Rangewide -- the Flat Tailed Horned Lizard
21 Rangewide Management Strategy.

22 HEARING OFFICER RENAUD: The RMS, yes. Okay.
23 Again, I know I've seen that, but probably not as an
24 exhibit.

25 MS. FOLEY GANNON: Yes.

1 HEARING OFFICER RENAUD: So good idea.

2 (Staff's Exhibit 310 was marked for
3 identification.)

4 MS. HAMMOND: And may I also identify as
5 Exhibit 311, I guess the pack of documents that were
6 docketed today, I believe. This is identification parcels
7 of land. This is information that came from the Bureau of
8 Land Management, and it was used to estimate the average
9 cost of each parcel.

10 HEARING OFFICER RENAUD: Do you have a docket
11 number?

12 MS. FOLEY GANNON: Was that docketed today?

13 MR. MEYER: That was docketed this morning.

14 MS. FOLEY GANNON: Okay. That's what you
15 distributed this morning by e-mail?

16 HEARING OFFICER RENAUD: No.

17 MS. FOLEY GANNON: No?

18 MR. MEYER: Yes.

19 MS. FOLEY GANNON: Yes, okay.

20 MR. MEYER: Yes. This is Christopher Meyer.
21 That was docketed this morning, but also I sent it out in
22 a separate e-mail to staff just in case there was a delay
23 in the docket, and I sent it to parties.

24 MS. FOLEY GANNON: What's the title?

25 MS. HAMMOND: The title of the first document is

1 "Acquisition Data from Bureau of Land Management,
2 California Desert District up to 2010" -- I'm just going
3 to put this on the record.

4 These acquisitions are specific to Flat Tailed
5 Horned Lizards in Imperial County, California.

6 MR. MEYER: And included in that docketed package
7 was information that also spoke to parcel sizes.

8 MS. HAMMOND: That's right.

9 MS. MILES: Yeah, we did receive that this
10 morning.

11 MS. HAMMOND: So I would just consolidate those
12 three documents and mark that package as Exhibit 311.

13 HEARING OFFICER RENAUD: Were they docketed
14 together as one, under one docket number? Do we know?

15 MR. MEYER: Excuse me, all three of those were
16 docketed as one package. Yeah, the information from BLM
17 that assisted them in developing the table or the numbers
18 on their tables.

19 HEARING OFFICER RENAUD: All right. It would be
20 great if we could identify it with the docket number, but
21 it sounds like we don't really have that.

22 MS. HAMMOND: No, I'm sorry.

23 HEARING OFFICER RENAUD: Let's see if I can
24 quickly get to it.

25 Well, it hasn't made it onto the docket log yet,

1 so we'll have to do without the docket number. But it's
2 been sufficiently identified I believe for the record, and
3 it will be 311.

4 (Staff's Exhibit 311 was marked for
5 identification.)

6 HEARING OFFICER RENAUD: Yes?

7 MS. MILES: I just wanted to clarify that the
8 Flat Tailed Horned Lizard Rangewide Management Strategy
9 was already Exhibit 440.

10 HEARING OFFICER RENAUD: Yes. No, I know that
11 because I was looking through the evidence, and I was
12 looking for, well, where is this in evidence, and I found
13 it in yours, of all places. So thank you, CURE.

14 Do you want to remove it or just leave it for
15 both places? It's probably easier to just leave it.

16 MS. HAMMOND: That's fine.

17 HEARING OFFICER RENAUD: Okay. Anything else?
18 Any other exhibits?

19 All right. Well, I like this idea of just the
20 mass admission into evidence of everything on the exhibit
21 list and everything just mentioned to put on the exhibit
22 list.

23 Does anybody have any objection to all of that
24 being admitted?

25 MS. FOLEY GANNON: No objection.

1 HEARING OFFICER RENAUD: CURE, no objection?

2 MS. MILES: No objection.

3 HEARING OFFICER RENAUD: Staff?

4 MS. HAMMOND: No objections.

5 HEARING OFFICER RENAUD: Those will -- those
6 documents will all be admitted into the record. And thank
7 you.

8 (All exhibits previously identified and
9 not previously admitted into the record
10 throughout this evidentiary hearing were
11 received into evidence.)

12 HEARING OFFICER RENAUD: I do want to ask
13 something going back to the Bio conditions. I mean,
14 reading the applicant's brief, you pretty strenuously
15 argued that you shouldn't have to pay the LTMF, the
16 long-term maintenance and management fee. And what I'm
17 hearing now is that you're conceding on that point.

18 Am I right about that?

19 MS. FOLEY GANNON: That's correct. What we -- I
20 mean, there's -- that's why we believe or are asking that
21 the power be allowed to be phased down, because we believe
22 that most of the land management costs will be borne by
23 BLM, and they did identify at the workshop that they might
24 need something like a 25-percent biologist and maybe
25 50-percent patrol person to help ensure that it's managed

1 right. So we said fine, we would agree that that would be
2 appropriate to pay for that to offset the impacts.

3 HEARING OFFICER RENAUD: I was perusing some regs
4 about all this, and I came across one that has categories
5 1 through 6. Is that where we're working here, this is a
6 6? It bases the fees on -- or the cost recovery on the
7 number of hours of work that BLM would have to do --

8 MS. FOLEY GANNON: Right.

9 HEARING OFFICER RENAUD: -- and this would be a
10 greater than 50 hours probably, right?

11 MR. MEYER: Yeah. We didn't really go over that
12 in the workshop, but one thing that BLM did make clear in
13 the workshop is that although there might be some offset,
14 as the applicant pointed out, the cost for them to manage
15 the lands as conservation would be higher than they are
16 currently to manage it as sort of more of a general --

17 MS. FOLEY GANNON: And, frankly, also --

18 HEARING OFFICER RENAUD: And then determine that.

19 MS. FOLEY GANNON: And we have heard from the
20 service that they want to see this too. And just as we
21 want to rely on what the service says about the big horn
22 sheep, we recognize we have to rely on what the service
23 has to say about the Flat Tailed Horned Lizard.

24 HEARING OFFICER RENAUD: Very good.

25 Okay. Thank you.

1 Anything? Any parties wish to add?

2 I think what we'll do is take a break before
3 public comment. But do any parties have anything else to
4 bring up?

5 Nothing?

6 MS. FOLEY GANNON: Not at this time.

7 HEARING OFFICER RENAUD: All right.

8 MS. HOLMES: Will there be any additional
9 committee questions after the public comment, or will the
10 public comment be the end of the hearing? Some of us have
11 briefs to work on.

12 HEARING OFFICER RENAUD: Yeah, I doubt it.

13 One second, please.

14 COMMISSIONER BYRON: One quick question, I think,
15 just for the applicant.

16 We're curious to know if there are any changes in
17 the project description that the applicants consider as a
18 result of filings from last Friday?

19 MS. FOLEY GANNON: There are no changes in the
20 project description.

21 COMMISSIONER BYRON: Thank you.

22 HEARING OFFICER RENAUD: Okay. No, I think you
23 can safely assume there will not be any further questions.

24 Mr. Meyer, you look like you have something to
25 say.

1 MR. MEYER: Oh, no, just before we went for a
2 break, I just wanted to let you know that Mr. Ernie Garcia
3 is here in person for the public comments when we come
4 back.

5 HEARING OFFICER RENAUD: Okay. And we'll
6 obviously accommodate people who are here, people who are
7 on the phone, and if there's anybody else, any other kind,
8 we'll accommodate them too.

9 MR. BABULA: Before you go to public hearing,
10 this is Jared, I just have a question regarding cultural.
11 Do you have any need for briefs on the cultural
12 testimony since that is actually the new -- that was
13 brought new today?

14 HEARING OFFICER RENAUD: Yes, well, I did give
15 dates for cultural briefs. I guess I consider them
16 optional, but given the kind of magnitude of the area and
17 the controversy, I just imagine some or all of you would
18 like to write briefs, and we would certainly read them
19 with great interest.

20 MS. FOLEY GANNON: And those are due on Friday;
21 is that correct, Friday the 20th, I believe.

22 HEARING OFFICER RENAUD: Yeah, 20th, right.

23 MR. BABULA: So there's no specific question at
24 this point that the committee has that needs to be
25 addressed.

1 HEARING OFFICER RENAUD: What I found is, I mean,
2 what you did previously was great, which was you decided
3 what was important to you and wrote about that, and that
4 was a great way of putting the issues that are actually
5 controversies before us.

6 MR. BABULA: Okay.

7 HEARING OFFICER RENAUD: So let's do it that way.

8 MR. BABULA: That will work. Thank you.

9 HEARING OFFICER RENAUD: Sounds like you're ready
10 to write.

11 MR. BABULA: Oh, yeah.

12 HEARING OFFICER RENAUD: Okay.

13 MS. MILES: When do you expect the transcript
14 from today to be available?

15 HEARING OFFICER RENAUD: They've been very fast.
16 I think we're on three-day turnaround, aren't we?

17 THE REPORTER: Three or four days.

18 HEARING OFFICER RENAUD: So maybe by the end of
19 the week.

20 MS. MILES: So the briefs are due at the end of
21 this week? On Friday? That is correct?

22 HEARING OFFICER RENAUD: Yes.

23 MS. MILES: So that won't give us an opportunity
24 necessarily. Do you think we could bump it until Monday?

25 HEARING OFFICER RENAUD: The problem is -- no,

1 because we need to -- we're on a tight schedule to publish
2 the PMPD, and if you give me a brief on Monday, I wouldn't
3 be able to consider it, the committee wouldn't have time
4 to consider it and incorporate your arguments. The fact
5 that you were here today, I think you should be able to --

6 MS. MILES: Right, but I can't reconstruct
7 exactly what was said during this hearing.

8 HEARING OFFICER RENAUD: Well, this is Monday. I
9 mean, from what I've been seeing, Thursday's not
10 unrealistic.

11 MS. MILES: Is it possible for the commission to
12 put a rush or pay an extra fee in order to get --

13 HEARING OFFICER RENAUD: I think we're already
14 doing that.

15 (Conversation with the court reporter beyond
16 range of microphone.)

17 HEARING OFFICER RENAUD: But that's pretty much
18 what you've been doing; but if we could get it Thursday,
19 obviously everybody would like that instead of Friday, but
20 I know you're doing your best.

21 MS. MILES: Yeah, I'm certainly not criticizing
22 the person who's doing the transcripts, I'm just saying
23 it's very difficult for me to draft a brief when I would
24 like to excerpt, you know, from the testimony today. And
25 I was not taking notes because I was actively questioning

1 witnesses.

2 HEARING OFFICER RENAUD: I guess my suggestion,
3 having done a lot of that kind of thing, is to write your
4 brief best you can, tell whatever somebody said to the
5 best you can recall it, put it in there. When you have
6 access to the transcript, if you need to cite to it or
7 correct something, change something, we'll certainly allow
8 you to do that.

9 MS. MILES: Okay. Thank you.

10 HEARING OFFICER RENAUD: But we're facing a big
11 crunch here. All right? Very good.

12 Let's break till 5:30. And then we'll be back to
13 begin our public comment.

14 I suppose I should officially say then we'll
15 consider the record closed except with respect to what's
16 necessary for conditions of certification to come in.

17 MS. HOLMES: Well, I think that with respect to
18 the very minor ones that I'm considering with worker
19 safety and fire protection, visual resources, I think the
20 record can be closed. I don't think there's any new --

21 MS. FOLEY GANNON: There was a request for two or
22 three pieces of information related to Phase 1 that we
23 will be submitting, but I think it probably could be.

24 HEARING OFFICER RENAUD: I'm not sure that would
25 need to be -- I guess it would be good for that to be in

1 the record.

2 MS. HOLMES: I think that -- yeah, I think
3 anything that's going to be the basis of changes and
4 conditions of certification ought to be in the record, but
5 my point is I'm not sure that the staff's response to that
6 information in the form of a revised condition of
7 certification needs to be part of the evidentiary record.
8 It's staff's recommendation based on what's in the record.

9 MS. FOLEY GANNON: I think the only piece of
10 information will be this -- these -- I guess they're
11 narrowed down to pieces of information related to Phase 1.

12 HEARING OFFICER RENAUD: Well, then we'll close
13 the record other than for those two items which will be
14 entered into the record when they get here.

15 MS. FOLEY GANNON: As soon as we can.

16 HEARING OFFICER RENAUD: All right. Very good.
17 Thank you all.

18 MS. FOLEY GANNON: Thank you.

19 HEARING OFFICER RENAUD: See you in 15 minutes.

20 (Recess.)

21 HEARING OFFICER RENAUD: We're now back on the
22 record.

23 We wish to thank you, members of the public who
24 have been waiting to give us your comments.

25 Commissioner Byron, would you like to make any

1 remarks before we start?

2 COMMISSIONER BYRON: Well, we've had a very
3 productive day today with regard to our evidentiary
4 hearings. I believe that we've concluded all the
5 necessary evidentiary hearings, and we have a very rich
6 record now in order -- and I'm confident that we have all
7 we need to make a proposed decision; however, we do always
8 notice our meetings for public comment, and we would
9 welcome those that would wish to speak at this time.

10 Mr. Renaud, why don't you go ahead and take us
11 through them. I think we may have some here and down
12 south as well.

13 HEARING OFFICER RENAUD: Yes, thank you.

14 Let me ask, Ms. Jennings, do we have public
15 commenters there with you?

16 MS. JENNINGS: Yes, we do.

17 HEARING OFFICER RENAUD: All right. And can you
18 give me an idea of the number?

19 MS. JENNINGS: Two.

20 HEARING OFFICER RENAUD: Okay. And do we have
21 public commenters on the phone who wish to speak.

22 MR. EMMERICH: Hello, I am one. My name is Kevin
23 Emmerich from Basin and Range Watch.

24 HEARING OFFICER RENAUD: Yes. Good afternoon,
25 Mr. Emmerich.

1 Anyone else?

2 All right. Well, Ms. Jennings, why don't you go
3 first. Would you like to --

4 MS. HARMON: This is Edie Harmon. And I would
5 like to respond to some of the things that I heard about
6 cultural resources this morning.

7 I think I've been at all the hearings and
8 workshops from the very beginning, and early on there was
9 a question as to whether Native Americans had been
10 involved from the very beginning. And I was at the
11 scoping meetings in El Centro, and I remember Carmen Lucas
12 getting up and making a very eloquent and passionate
13 statement about the concerns that she and Native Americans
14 have. I believe also that maybe Preston Arrowweed and
15 Helena Quintana Arrowweed were there and other people. I
16 don't know, I can't remember who all spoke, but it was
17 Carmen that just completely caught me off guard with the
18 significance of the area. And that made a big impression
19 in my involvement in this project.

20 And I was granted consulting party status by BLM
21 to participate in the Section 106 consultation because I
22 have been concerned and I've been involved with the
23 Quechan tribal members and Native Americans since the,
24 probably, early or mid 1990s on issues related to cultural
25 resources and sacred sites on public lands.

1 And I think one of the concerns that I have from
2 that long experience -- and I was involved in looking at a
3 mining project proposal for, I think it was about 1600
4 acres, big cyanide heap leach open pit mine that was on
5 public lands on eastern Imperial County. And it turned
6 out in the course of cultural resource evaluations and
7 repeated efforts of looking at it, that the area was very
8 rich, very important, the initial cultural resource study
9 was determined to be inadequate, and there were additional
10 studies.

11 And in the end there was a definition of the area
12 of potential effect, there ended up being a designation
13 for an area of traditional cultural concern because of the
14 number of trails and sacred sites and cultural resources
15 that were important not just to the Quechan but to Native
16 American tribal groups all up and down the Colorado River.
17 And the area was rich in its importance to creation
18 stories and the cultural traditions for many, many people.

19 And ultimately I think I got involved and started
20 working on mining issues and working with Native Americans
21 probably in maybe like 1996 or so. And it was in January
22 of 2001 that the secretary of the interior finally made a
23 determination to deny or not approve the plan of
24 operations for the Glamis Imperial Mine, and my
25 understanding was it was -- we were in the U.S., that BLM

1 or any federal agency had ever denied a plan of operation
2 for mining on public lands managed by the government.

3 The reason, if I remember correctly, for the
4 denial of the plan of operations was because of the
5 significance of cultural resources and sacred sites, and
6 that the tie-in with sacred geography and visual
7 resources, and it was a tremendously important area.

8 And I had been out there with Tibetan refugees.
9 They could see there's something about some of these
10 places that is unique and very important to traditional
11 people. They can see it, whether this is their country of
12 origin or whether they're from some other very rural area.
13 So they see things -- people with a simpler life and
14 different traditions see things maybe with different eyes
15 than those of us that grow up in urban areas or from a
16 western tradition.

17 So I mean, I've learned a lot through the years
18 of being able to work with the Quechan. And I've known
19 Preston Arrowweed for a long, long time. And the more
20 time I spend with more Native Americans, the more I am
21 appreciative of what I'm learning from them.

22 And where I live, I can walk probably 50 yards
23 from my house, and I come across one of these trails that
24 goes from Mountain Signal, or as Preston said, Eagle
25 Mountain to the Coyote Mount. Every time you get up on a

1 rise where you get desert pavement or a crust, you can see
2 where the trail has worn through from footprints. I mean,
3 it's human footprints. It disappears when you go down
4 into the wash, but if there's nothing on the horizon, you
5 see the next place where it gets up higher and the soil
6 has desert pavement. And you can follow the trail all the
7 way.

8 And I've walked miles along this trail, and I can
9 see how these trails -- early inhabitants from a place of
10 water, a place of resources, where it was hot, you know,
11 in the summer, they would go up into the mountains in the
12 winter. So they would follow the resources.

13 But, you know, it is very impressive to see the
14 things that have been there for hundreds or thousands or
15 years are still there if we don't disturb them. And to
16 me, that is incredibly important. So I understand. And
17 every time I go from El Centro to my home outside of
18 Ocotillo, I am impressed by the beauty of the washes.

19 And I was out on the sites this morning, what,
20 maybe 6:30 in the morning, we were out there. We just
21 randomly stopped because we wanted to stop and visit the
22 site. There was desert pavement. There was no evidence
23 of heavy off-road vehicle activity. And if I recall
24 correctly, I don't even recall seeing my footsteps in the
25 soil. You could hear the walk on top of the surface

1 because it was so quiet.

2 And I had been out on the site in April, just,
3 again, randomly stopping at places and walking along to
4 see the vegetation on the surface and in the washes.
5 Again -- and I was with, I think, five or six other people
6 in April, the end of April. We did not see heavy --
7 evidence of heavy off-road vehicle activity disturbing the
8 areas where we were. Granted, there may be some places,
9 but the places that I've been randomly stopping were not
10 heavily impacted by off-road vehicles. And I just wanted
11 to let you know that.

12 And the other thing I wanted to explain is why do
13 people not intervene, why did maybe the tribe not
14 intervene or myself or other people. The process of
15 intervention has incredible deadlines. I participated as
16 a witness on groundwater for Tom Budlong. It is an
17 extraordinarily difficult and time-consuming process. Few
18 take it seriously. And I can understand why more
19 individuals and, say, the Quechan tribe, why people don't
20 intervene if they don't have the help of attorneys or a
21 number of people to work on the issues, because meeting
22 all the these deadlines is incredible.

23 And for these people that have intervened, or
24 like CURE, I just don't understand how people can do it.
25 I don't understand how you can have one deadline days

1 apart and keep, you know, your Sanity as you're doing
2 everything that's necessary to participate. Because I
3 found it very difficult, even just to deal with the issues
4 I was, to be able to get things done and in on time.

5 So to me, people should not be critical of those
6 of us who care very much but have found it not possible
7 to, you know, physically or financially or for whatever
8 reason. You know, for me it was health issues also, to be
9 able to participate in the process as an intervenor.

10 If we don't intervene, it doesn't mean we don't
11 care, it just means that we recognize the incredible
12 obligations and responsibilities that go along with
13 intervention and find that it's, you know, overwhelming,
14 and we can't take it on.

15 And Donna and I considered trying to intervene
16 together, but it was more than the two of us could manage
17 without help because we knew what it would take.

18 And when it comes to consultation with the tribe
19 and dealing with cultural resources, over and over again
20 today I listened to people say the surveys aren't done,
21 there needs to be more work. And I would urge both BLM
22 and the CEC, it's not prudent to be making decisions which
23 become Irrevocable before you know the full extent of the
24 significance and the magnitude of the cultural resources.

25 When this site has more -- or this proposed

1 project area has more cultural resource sites and more
2 significant than any of the other sites that are being
3 proposed, I would urge you, please don't rush headlong
4 into making a decision which ultimately may not be wise
5 and may cause a lot of hurt.

6 If BLM could say no to an open pit cyanide heap
7 leach mining project when it has never been done before,
8 there are certainly times, circumstances, and reasons
9 where you need to go very slowly. And if you're not ready
10 to say no yet, don't rush into something which, you know,
11 once you get the information and the damage is done, it
12 can't be -- there's no way out. The damage is done.

13 And I -- over and over it seems like whether it's
14 from the state or any of the consultants, that you really
15 don't have the information that you need on cultural
16 resource surveys and the cultural landscape to be able to
17 make the decision that it's okay essentially to wipe out
18 and obliterate for all time what people are trying to tell
19 you is extremely important.

20 And when I hear that this is a landscape of
21 national significance because sites like this are unique
22 in the California desert, that should be a warning that --
23 and Claudia Nissley with her background as a state SHPO
24 and the ACHP certainly has looked at a lot more of these
25 proposals than I have. And it seems like you don't make

1 decisions and do the studies afterwards. My understanding
2 of CEQA and NEPA is you need to look at the whole of the
3 project up front and do all the necessary studies and
4 complete them before you make a decision to approve a
5 project. If you want to deny a project, you don't have to
6 do all the studies, but if you want to consider approval,
7 the studies should be completed before that decision and
8 not deferred to some future time.

9 I've just been looking at CEQA and the CEQA
10 guidelines for another project, and over and over again I
11 see do the studies, don't defer, look at the whole of the
12 project, not just piecemeal say things and then say you're
13 going to defer the other studies to the future. Because
14 once you've made the approval, you know, that's it, you've
15 set up a conflict. If you realize at a later point that
16 wasn't a decision you would have made had you had more
17 information, too late.

18 Anyway, I am concerned. I learned a lot today.
19 And I learned that there's far more concerns than what I
20 had seen or understood before, and from people that have a
21 lot more expertise than I do. I just care, because, you
22 know, I know some of the people involved and I know the
23 area and I've lived here more than 30 years. It might not
24 be my traditional cultural heritage, but it's still an
25 area that I care very passionately about.

1 Thank you.

2 HEARING OFFICER RENAUD: All right. Thank you
3 for your comment, Ms. Harmon.

4 Next I will call Ernest Garcia, who is here in
5 the Commission Hearing Room A.

6 Take any seat and pull a mic up to you and press
7 the push down there so you get the green light. There you
8 go. And pull that right up close to you so everyone can
9 hear you.

10 MR. GARCIA: Looks like I'm on.

11 First of all, Commissioner and Commissioner, I
12 certainly would like to thank you for allowing me to speak
13 this afternoon here at the hearing.

14 My name is Ernest Garcia, and I'm a resident of
15 Folsom, California. And I'm a seventh-generation
16 Californian.

17 I'm a member, past member of the board and
18 current chair of the Expedientes Land Grant Records
19 Committee for Spanish and Mexican land grant holdings for
20 Los Californianos, this group of some 750 members who
21 trace their roots back to the first Spanish colonists that
22 came to California starting in 1769.

23 I am also vice president of the National Society
24 of the Sons of the American Revolution, Sacramento
25 Chapter. I'm a member of Spain's society of the American

1 Revolution based in Madrid, Spain.

2 The relevance of this background will soon be
3 apparent.

4 The proposed location of the Imperial Valley
5 Solar Project site near Coyote Wells and Plaster City,
6 California would cause irreparable damage to the
7 interpretation and appreciation of California's unique
8 history. Specifically, the Juan Batista DeAnza National
9 Historic Trail.

10 As my background illustrates, the history of the
11 DeAnza Trail has not been -- has not only national but
12 also international implications. The trail crosses
13 territories once governed by the American Indian peoples,
14 by Spanish and Mexican citizens, and ultimately by
15 Americans.

16 If approved as currently planned, the project
17 would cut across the historic Juan Batista DeAnza National
18 Historic Trail established by the acts of the U.S.
19 Congress and administered by the National Park Service.

20 None of the documents on the CEC and BLM websites
21 for the application describe adequate mitigation for the
22 permanent destruction of the local habitat, the flora and
23 fauna unique to the tail end of the story of California's
24 and America's immigrant past.

25 It is my sincere concern that the project would

1 forever destroy an important segment of this historic
2 route and deprive generations of Americans from meaningful
3 firsthand experiences that can bring them to a better
4 understanding of our multi-ethnic culture and heritage.

5 This concern is for the trail corridor itself and
6 its nearby recreational components. The Anza Trail was
7 first used by the indigenous peoples of California and
8 Arizona. It was later used as an early and important line
9 of communication between New Spain and Alta California,
10 current-day Mexico and California respectively during the
11 18th and 19th centuries.

12 In 1776, Spanish army captain Juan Batista DeAnza
13 used the trail to bring over 240 Spanish soldiers and
14 their families to establish the cities of San Francisco,
15 Mission Dolores and the Presidio of San Francisco. In
16 1782 Captain Fernando de Rivera y Moncada used the same
17 trail to guide Spanish soldiers and settlers to establish
18 the cities we know today as Los Angeles, Ventura, and
19 Santa Barbara. Among the group that established
20 Los Angeles and Ventura came Sons of the American
21 Revolution compatriot and fourth great-grandfather Josef
22 Manuel Valenzuela, a soldier who like all Spanish colonial
23 citizens at the time monetarily supported the Continental
24 Congress and army during the American revolution.

25 In 1780, King Carlos III asked every Spanish

1 soldier in Spain's domain to contribute two pesos to the
2 American Revolution. And this money was subsequently
3 transmitted to the American colonies in part by way of the
4 Anza trail.

5 If approved, this project would set a dangerous
6 precedent. This project is no more appropriate on this
7 trail than it would be on the Lewis and Clark National
8 Historic Trail, the Sacramento National Wildlife Refuge,
9 or the National Mall in Washington D.C.

10 I urge the commission to deny the application for
11 licensing and construction of the Imperial Valley Solar
12 Power Plant in its current location. I do not believe
13 that you have the right and authority to rescind or modify
14 public law 90-543 and public law 101-365 that recognize
15 the contributions and importance of this trail to my
16 ancestors.

17 The federal government is tasked with the
18 identification and protection of this historic route and
19 its history, remnants, and artifacts for public use and
20 enjoyment.

21 Thank you very much for listening to me.

22 HEARING OFFICER RENAUD: And thank you for your
23 comments, sir. We appreciate that.

24 MR. GARCIA: You're welcome.

25 HEARING OFFICER RENAUD: Okay. Well, since we've

1 done one in El Centro, one here, let's do one on the
2 phone.

3 Mr. Emmerich, go ahead.

4 MR. EMMERICH: Hello. Thank you, and thanks a
5 lot for allowing me to put in another comment here.

6 I'd like to just point out a couple of things.
7 And first of all, I wanted to kind of back up what
8 Edie Harmon said about a couple things.

9 Number one, intervening is not easy. As some of
10 you know, our group has intervened on four of these energy
11 commission projects. They're very, very daunting. We've
12 actually been asked, why didn't you intervene on Imperial?
13 And the answer is because we're tired. There's just too
14 much to do on it. And so putting the burden on the public
15 to intervene is not exactly fair because it is -- like I
16 said, it's a very daunting task, and many people just
17 aren't going to be able to do that.

18 Now, maybe the energy commission could consider,
19 you know, having some more people assist intervenors in
20 some of these processes, because we can hardly keep up
21 with it sometimes. We feel like we've broken a record
22 with four.

23 I'd also like to agree with Edie's comments about
24 the site having more minimal off-road disturbance. I've
25 been to the site a year ago. I took a look on the site.

1 I saw some tire tracks, but I would say the majority of
2 the Imperial site just does not have as much disturbance
3 and I have been hearing today.

4 Now, my comments are -- my final comments, I'm
5 not going to spend that much time on this, but they're
6 concerning the cultural resources here. I don't claim to
7 be an expert on the local cultural resources down there,
8 but I have been reading about it, and I did learn some
9 information today. And I would like to appeal to the
10 ethics of the people making the decision to approve or
11 deny this project.

12 From what I'm hearing, burial sites will be
13 obliterated. And I'd like to people to think about, well,
14 what if it were your ancestors that were buried there,
15 what if it were you, and how would you feel if an energy
16 developer were making these plans for this area?

17 I believe that the energy commission has a pretty
18 unique opportunity here, and that is to deny approval of
19 this project. There are some alternatives out there that
20 deny projects and designate the regions unsuitable for the
21 future for any energy development. And if we did that for
22 this site, I don't think we'd be having to deal with these
23 problems right now.

24 And in addition, the BLM should really consider
25 making this area an area of critical environmental

1 concern. And again, that would provide some much needed
2 and deserved protection to an area that I think is getting
3 very, very neglected.

4 So, again, thank you for allowing me to make
5 these comments. Have a good day.

6 HEARING OFFICER RENAUD: Thank you for your
7 comment, Mr. Emmerich.

8 And now let's return to El Centro.

9 Is there another public comment?

10 MS. TISDALE: Yes. I think I'm the last one.
11 This is Donna Tisdale.

12 HEARING OFFICER RENAUD: Yes, go ahead, please.

13 MS. TISDALE: Thank you for the opportunity, but
14 it's very disturbing, especially the July 27th staff
15 comments on findings of overriding considerations that
16 came out actually during an evidentiary hearing and while
17 it was still going on. You know, the majority of the
18 people feel apathetic, they don't want to get involved,
19 and this is one of the reasons why they don't, because
20 they feel like what's it worth, it's going to be all
21 ignored.

22 But I'm here because I'm actually part of a group
23 that will most likely be protesting this approval, which I
24 expect will come. And we will probably be filing some
25 litigation. So I want to just get my comments in here on

1 the record.

2 I want to support what was also said here today.
3 This project site, I've been on it, been around it, and
4 passed it, I don't know how many times, going back and
5 forth. My family's all here in the valley. I live in the
6 mountains. I see this, I don't know how many times. And
7 the site is not as disturbed as has been alleged. It's
8 got minimal areas of disturbance. There's lots of
9 impacts, desert pavement, habitat resources.

10 There's actually more questions than answers,
11 especially after listening to testimony today.

12 I also want to repeat that the Imperial Valley
13 Solar Project Phase 2 relies on the Sunrise Powerlink, and
14 the Sunrise Powerlink is a connected action as stated in
15 the BLM's Final EIS for the Sunrise Powerlink. And along
16 with that project, this project, there are significant
17 cumulative impacts.

18 For the Sunrise Powerlink, cultural resources,
19 programmatic agreement was approved and Section 106
20 consultations had not even started in earnest until after
21 the project was approved. I believe the Sunrise cultural
22 report just came out this last summer, several years after
23 the project was approved. This is actually part of our
24 federal complaint against the BLM sunrise approval, and
25 it's an issue here.

1 I also want to note that on August 12th, 2010,
2 San Diego Superior Court Judge Judith Hays granted a
3 permanent injunction to stop work on a \$20 million
4 reservoir project as requested by the Native American
5 Heritage Commission. And that was due to cremation sites
6 and bone fragments. I want to note that that project is
7 only several acres and cannot compare in scale and scope
8 to the Imperial Valley Solar Project and the area of
9 project effect.

10 I also want to note that the project documents
11 say that most of the Brown Turbans are located on the
12 project boundaries. But on a trip there to the site in
13 April, I witnessed Brown Turbans near the proposed
14 substation location just east of the existing road that
15 has been designated as the main entrance. I will try to
16 find the photo I took of that plant and submit it to
17 staff.

18 Also, on the air quality and speed limit issues,
19 I spoke to my brother this morning who is a farmer here in
20 the Imperial Valley. He said they are required to stop
21 work if the wind is blowing over 15 miles per hour and
22 their equipment is creating a trail of dust. Yet this
23 project will destroy desert pavement and the soil crust,
24 increasing airborne particles.

25 On my way to this hearing this morning, I saw an

1 off-road vehicle racing across the site on a designated
2 route. And there was a huge plume of dust behind it. And
3 it's just very disturbing to me to think that the desert
4 pavement that suppresses that dust now and actually
5 maintains all these cultural resources will be destroyed
6 for a project that does not benefit the local community,
7 it's for energy to go to areas out of the area.

8 So this is a huge environmental justice issue not
9 only for the Native Americans, but for Ocotillo and
10 Imperial Valley in general. And we've seen this happen
11 time and time again, the cumulative effects, the scale and
12 scope of these projects are beyond anything known. And
13 it's just -- there's more questions than answers. And I
14 would urge the commission to not set a bad precedent of
15 approving this project.

16 Thank you.

17 HEARING OFFICER RENAUD: Thank you for your
18 comment.

19 Let me ask if there is anyone else who wants to
20 comment on the phone?

21 No?

22 Anyone else in El Centro?

23 MS. JENNINGS: No.

24 HEARING OFFICER RENAUD: Thank you. Okay.

25 Anyone else here in Sacramento?

1 All right. Thank you all for your comments.
2 Commissioner Byron would like to say a few
3 things.

4 COMMISSIONER BYRON: Thank you, Mr. Renaud.
5 Thank you for the way you've conducted this hearing.

6 My special thanks to Ms. Jennings who once again
7 is down there in El Centro helping facilitate public
8 comment. We appreciate that, Ms. Jennings, in these
9 difficult budgetary times.

10 And I think it might be appropriate just to speak
11 briefly on behalf of our public advisor's office. She
12 operates on a very limited budget with very limited staff.
13 And they do a great job making sure that the public is
14 aware of these meetings.

15 Ms. Jennings, thank you.

16 I'd like to thank everyone that participated in
17 this evidentiary hearing. As I said earlier, I believe we
18 have a rich record of information. I'm confident that we
19 will be able to make a determination as we're required to
20 do by law. I believe that ends the evidentiary hearing
21 for today and I believe for this case. We won't need to
22 reopen; is that correct?

23 HEARING OFFICER RENAUD: That's right. Very much
24 so.

25 COMMISSIONER BYRON: So on that, I will thank you

1 and say we are adjourned.

2 (Thereupon the hearing adjourned at 6:06 p.m.)

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CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing Evidentiary Hearing Before the California Energy Resources Conservation and Development Commission, that I thereafter had it transcribed under my direction.

I further certify that I am not of counsel or attorney for any of the parties to said meeting, nor in any way interested in the outcome of said meeting.

I WITNESS WHEREOF, I have hereunto set my hand this 19th day of August 2010.

JOHN COTA